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Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. MERRETT, and CECILIA A. CLAYTON, as personal representative of the estate of SOLOMON CLAYTON, JR., on their own behalf and on behalf of all others similarly situated, PETITIONERS

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement, ROBERT DEMPSEY, individually FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, ROBERT BUTTERWORTH, and LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITY OF LAKELAND POLICE DEPARTMENT, CITY OF MAITLAND POLICE DEPARTMENT, and CITY OF LARGO POLICE DEPARTMENT, RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a roadblock established on the pretext of ensuring compliance with traffic related laws, but admittedly designed to intercept illegal drugs, is unreasonably pretextual and therefore unconstitutional.

2. Whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979).

3. Whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and a canine sniffs.

4. Whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

John M. Merrett, Plaintiff/Petitioner

Estate of Solomon Clayton Jr., as represented by Cecelia A. Clayton, Plaintiff/Petitioner

Certified class of motorists who were subject to the roadblocks at issue, Plaintiffs/Petitioners

James T. Moore, Commissioner for Florida Department of Law Enforcement, Defendant/Respondent

Robert Dempsey, Defendant/Respondent

Leonard Mellon, Executor Director of Florida Department of Highway Safety & Motor Vehicles, Defendant/Respondent

Lawrence Crow, Chief of Police, City of Lakeland, Florida, Police Department, Defendant/Respondent

Robert Butterworth, Defendant/Respondent

Fred O. Dickinson, Defendant/Respondent

Jerald Vaughn, Chief of Police, City of Largo, Florida, Police Department, Defendant/Respondent

John M. Erwin, Chief of Police, City of Maitland, Florida, Police Department, Defendant/Respondent

City of Lakeland, Florida, Police Department, Defendant/Respondent

City of Largo, Florida, Police Department, Defendant/Respondent

City of Maitland, Florida, Police Department, Defendant/Respondent

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals below is found at *Merrett v. Moore*, 58 F. 3d 1547 (11th Cir. July 25, 1995) (App.1-13), rehearing denied with opinion on January 9, 1996 (App.14), rehearing *en banc* denied with three dissents, *Merrett v. Moore*, Eleventh Circuit Slip Opinion at 1322 (11th Cir. February 26, 1996) (App.15-24).[1]

JURISDICTION

The order below was entered on July 25, 1995, with rehearing denied on January 9, 1996. This Court has jurisdiction to review the order below by writ of certiorari by reason of 28 United States Code Section 1254(1).

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[1] Copies of the district court opinions granting summary judgment to Respondents and dismissing Petitioner's claims have been lodged with the Clerk.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The undisputed facts and the disposition of the case in the district court were set out in the opinion of the Eleventh Circuit (App. 1-13). We will quote those matters below, adding footnotes where necessary to supply additional facts or explanations:

> This case requires us to consider when, consistent with the Constitution, a state may establish roadblocks for the chief purpose of locating illegal drugs.
>
> * * *
>
> From 1982 through 1984, the Florida Department of Law Enforcement (FDLE) developed a series of operations intended to intercept illegal drugs on state highways. As part of the operation, FDLE officials proposed to set up temporary checkpoints along highways to stop all traffic and expose the cars to narcotic sniffing dogs. Because the FDLE has no authority to establish roadblocks, it asked for the assistance of the Florida Highway Patrol (FHP) to set up drivers' license checkpoints.[2]

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[2] FDLE officials had been advised by their counsel that its original plan to conduct drug roadblocks would likely be struck down by the Courts, but that if the operation occurred in conjunction with a driver's license roadblock conducted by a traffic authority such as the FHP, such an operation *may* be less problematic. However, FDLE's counsel expressed "grave

FDLE officials also requested the assistance of K-9 units, each consisting of a narcotic sniffing dog and its handler, from the cities of Maitland, Lakeland, and Largo, Florida.

The joint operation plan, entitled "Interdiction of Illegal Narcotics, North Florida," called for roadblocks from 4:00 p.m. until 10:00 p.m. on January 11 and 12, 1984, at specific sites on four Florida highways near the Georgia state line.[3] Six FHP troopers, one FHP investigator, five FDLE troopers, and four or five K-9 units were assigned to each site.[4] . . . The FHP troopers were responsible for traffic control and for stopping vehicles, checking obvious safety defects, and examining drivers'

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reservations about the overall scheme." R-6-122-0. Nevertheless, FDLE officials contacted FHP officials and asked them to establish driver's license roadblocks so as to justify FDLE's desire to stop all passing motorists to expose them to drug dogs. FHP complied.

[3] Several of these "highways" were busy commuter roads, such as U.S. 319, which is the only direct route connecting the sister cities of Tallahassee, Florida, and Thomasville, Georgia.

[4] Other law enforcement also participated. For example, an officer of the Florida Game & Freshwater Fish Commission used the occasion to check motorists for hunting violations. He required some motorists to open coolers for his inspection. Local deputy sheriffs were also present and, in some cases, motorists were questioned about their ownership of property in their vehicles. For example, one class member was detained until he could establish that stereo equipment in his trunk was not stolen.

licenses and vehicle registrations. They were instructed to stop all traffic passing through the roadblocks until traffic became congested, in which case vehicles were to be waved through as necessary to a oid long backups.[5]

The dog handlers were told that the outside of each car was to be sniffed by the dogs[6] as FHP troopers checked the driver's license and vehicle registration. If a dog alerted to the presence of drugs or if license or registration problems were found, the car was directed to a location out of the flow of traffic.[7] In the case of a dog alert, a second dog was supposed to check the outside of the car.[8] If the second dog alerted, consent to search was requested; and, if refused, the driver was detained until a search warrant was obtained. FDLE agents worked with the dog handlers and were responsible for making decisions about vehicle searches if a dog alerted to the presence of drugs.

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[5] These instructions notwithstanding, long backups occurred.

[6] Although the dogs generally sniffed immediately "outside" the vehicle, the contents of the vehicles, *including the passengers*, were the subject of the sniff.

[7] This also occurred where an officer suspected other illegal activity, such as a hunting violation or thought property in the vehicle might be stolen. *See* note 4, *supra*.

[8] This only occurred sometimes.

> Other teams – each consisting of an FDLE agent, an FHP trooper, and K-9 unit – were directed to walk around vehicles parked in nearby rest areas and truck stops. If the dogs alerted, the driver was to be located and asked for consent to search. . . .
>
> During the two day operation, approximately 2100 vehicles passed through the roadblocks of which roughly 1330 were stopped. With the vehicles checked by teams at the rest areas and truck stops, approximately 1,450 vehicles were sniffed by the dogs. The dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics.[9] In addition, law

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[9] Despite the fact that only one (1) of the 28 vehicles to which the dogs alerted contained any illegal drugs, these individuals were all subject to extensive delays, often lasting more than an hour, and their vehicles were subject to extensive searches. The explanations for the false alerts on 27 of 28 cases include foreign environmental conditions, health, and weariness and attitude of the dogs, all of which affect their abilities. Moreover, because these dogs react to *an odor* rather than *a substance*, they are incapable of distinguishing an odor emanating from the present presence of an illegal drug from an odor emanating from the past or present presence of a legally prescribed drug containing a component similar to an illegal drug, the odor remaining from the past presence of an illegal drug, or odors from several other substances with which the occupant may have had contact. Also, U.S. currency on the person of an occupant may cause an alert. In *United States v. Six Hundred Thirty-Nine Thousand Five Hundred*

enforcement officials issued sixty-one vehicle-related citations.

At the roadblocks, the actual encounter with the officers conducting the drivers' license checks lasted a few minutes. And, the dogs usually were able to sniff the exterior of the cars before the license and registration checks were completed. So, most people experienced only a slight delay. But, during rush hours, traffic backed up; and some people waited thirty to forty-five minutes before arriving at the roadblock or being waved through.[10] In general, vehicles were permitted to leave the

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Fifty-Eight Dollars ($639,558.00), 955 F.2d 14 (D.C. Cir. 1992), an expert testified that ninety percent (90%) of all cash in the United States contains sufficient quantities of cocaine to alert a trained dog. One study indicates that up to ninety-seven percent (97%) of all bills in circulation in this country are contaminated by cocaine. Crime and Chemical Analysis, 243 Science 1554, 1555 (1989); *see also United States v. $80,760.00 in United States Currency*, 781 F.Supp. 462, 475 at n.32 (N.D. Tex. 1991), aff'd, ____ F.2d ____ (5th Cir. 1992).

[10] The delays to motorists were somewhat more extensive than was set out by the court below. As the district court found, *many* people experienced delays of 30 minutes or more. R-9-209-4. Estimates of the average wait varied from 20 minutes to an hour, and most motorists could not escape enduring only the several minutes of delay experienced at the actual checkpoint. FDLE officials estimated delays of 30-35 minutes while a television reporter estimated average delays in excess of 30 minutes. Class members reported delays ranging from 30 minutes to more than an hour. R-6-117-32-33.

lines approaching the roadblocks and to turn around, but not without first being stopped by a trooper and having their registrations and drivers' licenses checked.[11] Still, in at least one instance, a driver was instructed to remain in line.

People whose vehicles were actually searched experienced longer delays. In addition, one car overheated; one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog.[12]

Plaintiffs, a class of motorists stopped at the roadblocks, brought suit against state and local officials

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[11] Very few people turned around and tried to leave and those that did so were subject to the same checks as those who passed through the checkpoint. Indeed, any attempt to leave could have been construed to constitute the misdemeanor of "fleeing an officer." *See* Section 316.1935, Florida Statutes (1995). Moreover, alternative routes would have required many hours of additional travel, so those who turned around likely had to cancel their travel plans.

[12] The magnitude of the disruption of class members' lives and the humiliation they experienced was not fully set out by the panel. In one case, a class member was delayed for hours while his 8½ month pregnant wife had left her workplace and awaited his arrival on a street corner in a bad neighborhood, unable to contact her husband. The dog alert to his vehicle was later attributed to aspirin. In another case, a dog scratched wildly at a car door while an elderly invalid woman was terribly frightened. The dog was later placed in the car and sniffed about the person of this woman. One man was bit, cars were scratched, and a number of persons expressed fear of the dogs.

involved in the operation. Plaintiffs say the checkpoints violated their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures.[13]

* * *

The district court disposed of the case through a series of orders.[14] First, the court dismissed the claim against the police chiefs and their city police departments on the grounds that the chiefs had not "knowingly conspired" to violate plaintiffs' rights and that the facts did not support imposing municipal liability. Next, the court addressed the merits of plaintiffs' constitutional claims and concluded that the operation, as planned, violated no constitutional rights. In a later order, the court granted defendants Butterworth and Dempsey qualified immunity on the grounds that, at the time of the roadblocks, it was not clearly established that the operation violated plaintiffs' constitutional rights. The court also dismissed the

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[13] Plaintiffs sought damages, as well as declaratory and injunctive relief because Defendants threatened that such operations "will continue to be implemented on an intermittent and unpredictable basis...".

[14] Copies of the orders of the district court have been lodged with the Clerk.

> claim against Moore and Dickinson because the planned operation did not – and in the future will not – authorize unconstitutional conduct.

An appeal to the Eleventh Circuit Court of Appeal followed, and on July 25, 1995, the panel affirmed the district court and generally adopted its reasoning. *Merrett v. Moore,* 58 F. 3d 1547 (11th Cir. 1995)(App. 1-13). Rehearing was denied with an opinion on January 9, 1996 (App. 14). Rehearing *en banc* was denied with the published opinion of three dissenters on February 26, 1996. *Merrett v. Moore,* Eleventh Circuit Slip Opinion at 1322 (App. 15-24).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With *U.S. v. Morales-Zamora*, 974 F. 2d 149 (10th Cir. 1992) and Respondents and the Court Below Have So Acknowledged

Respondents concede that the case at bar is factually indistinguishable from *U.S. v. Morales-Zamora*, 974 F. 2d 149 (10th Cir. 1992).[15] Moreover, the panel explained that it was aware that "the Tenth Circuit reached a different result in a somewhat similar case: *Morales-Zamora*," but explained that "we were not persuaded by that opinion." App. 14. Still further, the dissenters in the denial of rehearing *en banc* also found *Morales-Zamora* to be factually indistinguishable, writing that in *Morales-Zamora*, the Tenth Circuit was "considering a roadblock identical to the ones before us . . ." App. 18. The acknowledgments by Respondents, the panel and the *en banc* dissenters that this case directly conflicts with the decision of another circuit is strong evidence of this direct conflict.

An examination of this opinion in *Morales-Zamora* also shows the direct and intolerable conflict with the decision below. In both the case at bar and in *Morales-Zamora*, drivers' license roadblock checks were used as a pretext for subjecting all motorists on busy highways to canine sniffs for drugs. Clearer conflict among the circuits could hardly exist: the Tenth Circuit condemned this practice as violative of the Fourth Amendment; the Eleventh Circuit endorsed the practice. This direct conflict, of course, is a well-

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[15] Respondents so conceded at oral argument before the Eleventh Circuit. Moreover, their brief to the Eleventh Circuit did not attempt to distinguish *Morales-Zamora*, but argued that the case should not be followed. *Respondent's Brief* at 10.

established basis for the granting of certiorari review. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982); *U.S. v. Lorenzetti*, 467 U.S. 167 (1984).

Not only does the decision below conflict with the decision of the Tenth Circuit, but it also conflicts with persuasive dicta in *Texas v. Brown*, 460 U.S. 730 (1983). Although the court below purports to have exempted roadblock cases from pretext analysis, this Court had made it clear in *Texas v. Brown* that the pretext doctrine applies in roadblock settings. The *en banc* dissenters below, relying in part on *Morales-Zamora*, explained the conflict of the decision below with this Court's opinion in *Texas v. Brown*:

> In *Texas v. Brown*, 460 U.S. 730 (1983), the Court reviewed a decision where a court had suppressed evidence seized at a roadblock on the ground that the officer had to change his position in order to see the evidence, allegedly rendering the plain-view doctrine inapplicable. *Id.* at 734-35. Holding that the plain view doctrine did apply, the Court emphasized that there was "no suggestion that the roadblock was pretext whereby evidence of [a] narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Id.* at 743; *see also South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding inventory search because "there is

no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive").

As the Tenth Circuit explained in *Morales-Zamora,* [*supra*], when considering a roadblock identical to the ones before us, "[i]t would seem to follow [from the opinion in *Texas v. Brown,*] that had the roadblock [there], which was designed to check for driver's licenses and registration, been but a pretext to look for "plain view" evidence of more serious crimes, the seizure of the [evidence] would have constituted a violation under the Fourth Amendment." *Id.* at 152. Applying *Brown*, the court reasoned as follows: "[h]aving concluded that the primary reason for the roadblock stop of Zamora's car was not to check her driver's license, but to ascertain, with the aid of an ever-present sniffing canine, whether she possessed drugs, it follows that the stop was pretextual and all that occurred thereafter was tainted." *Id.* at 153.; *see also* [*U.S. v.*] *McFayden*, 865 F.2d at 1312-13 [(D.C. Cir. 1989)] (observing that driver license roadblock could be conducted in a way indicating that its principal purpose was to detect

> crimes unrelated to licensing, in which case "a subterfuge might result in an infringement of Fourth Amendment rights.").

App. 19.

The conflict created by the decision below with its sister circuit and with this Court's precedents is intolerable because it turns decades of "pretext" jurisprudence on its head. This Court has consistently condemned Fourth Amendment searches and seizures based upon pretextual motives at least since the time of *U.S. v. Lefkowitz*, 285 U.S. 452 (1932), noting that the pretextual use of police power raises a problem of constitutional magnitude. *U.S. v. Robinson*, 414 U.S. 218 (1973); *see Texas v. Brown*, 460 U.S. 730 (1983); *Colorado v. Bannister*, 449 U.S. 1, 5 n.4 (1980). Until now, lower courts have also unanimously condemned pretextual roadblock and traffic stops. *E.g., U.S. v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992); *U.S. v. Ozuna-Fuentes*, 773 F.Supp. 1495 (D.N.M. 1991); *Garrett v. Goodwin*, 569 F. Supp. 106, 119 (E.D. Ark. 1982); *U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986); *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992, 996, 996 (Ariz. 1983); *Myricks v. United States*, 370 U.S. 901 (5th Cir. 1967) (upholding safety check roadblock where "not done as subterfuge or ruse"); *State v. Smith*, 647 P.2d 562 (Okl. 1984); *McReynolds v. State*, 441 So.2d 1016, 1019 (Ala. 1983); *State v. Baldwin*, 473 A.2d 522, 526-27 (N.H. 1984).

In explaining the intolerable conflict that the court below created with existing "pretext" case authorities, the *en banc* dissenters wrote:

Under our longstanding precedent . . . when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. *See, e.g., United States v. Valdez,* 931 F.2d 1448, 1451 (11th Cir.1991); *Amador-Gonzalez v. United States,* 391 F.2d 308, 313 (5th Cir. 1968).

In this case, the government conceded that it would not have established the roadblocks absent its desire to intercept drugs. The panel, however, finds our pretext cases inapplicable because they involved roving rather than roadblock stops. The panel reasons that because "one officer's individual discretion does not affect the determination of who is stopped [at roadblocks] . . ., the pretext analysis, as set out in our [roving patrol] precedents, does not fit . . . ." *Merrett,* 58 F.3d at 1550 n.2.

Police officer discretion is not the primary concern of our pretext cases, however. While these cases recognize the danger posed by the discretion exercised by officers on roving patrol, they are grounded on

> the more fundamental concern that officers will attempt to evade the requirement of the Fourth Amendment by using a traffic stop to detain someone for a purpose that would not lawfully support a detention. In both cases, "the police engage [ ] in a deliberate scheme to evade the requirements of the Fourth Amendment. . . ." *Amador-Gonzalez*, 391 F.2d at 314 (quotation omitted).

App. 18.

As the *en banc* dissenters point out, the decision below attempts to distinguish pretextual roadblocks from pretextual stops by individual police officers because these roadblock stops were ordered by an agency head rather than a lone officer in the field. App. 18. However, whether the pretext is engaged in by an agency head who seeks *to evade the Constitution* or an officer in the field who seeks to *evade the Constitution* seems irrelevant to the pretext question. Indeed, the fact that the pretext here was committed at the State's highest policy level does not excuse such conduct – *it makes it far worse*. When a rogue policeman engages in a pretextual stop in violation of the Constitution and this Court's rulings through subterfuge, such actions are offensive, but can be often be attributed to poor training or "a bad cop" who is an exception to the rule. When, however, a high-ranking governmental official orders his subordinates to engage in conduct deliberately designed to evade the Constitution and this Court's rulings, such actions are far more constitutionally offensive than the unauthorized act of a

single police officers.

In this time of growing public distrust of government, the decision below hands government carte blanche to violate the law through pretext. It is no wonder that the public distrusts our government when the public is expected to live by the law but the court below winks and gives the government the green light when the government engages in a deliberate scheme to circumvent the law. This problem is all the worse when the governmental officials who engage in evasion of the law are the very same officials who we trust to fairly enforce the law.

Thus, the court below created irreconcilable conflict with its sister circuit and with the long standing precedents of this Court. This conflict is rendered intolerable because it turns all existing jurisprudence on this issue on its head, because of the number of persons affected and to be affected by the decision of the court below[16] and because of the severity of the decision's offensiveness to our cherished Fourth Amendment. Review by certiorari to resolve this conflict on these important issues is appropriate.

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[16] Over 2,000 people were affected by this operation alone. The "Checkpoint Charlie" scenario made possible by the court below has the potential to affect millions of citizens.

II. The Questions Presented Are Important Questions Of Federal Constitutional Law Which Should Be Settled By This Court

Each of the questions presented herein raises issues of exceptional importance. The overall importance of the issues presented was described well be the *en banc* dissenters of the Eleventh Circuit. They explained that the decision below

> makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire Court.

App. 16.

Because the *en banc* dissenters described the importance of the issues more eloquently than can counsel, we quote from their opinion to explain the importance of those issues:

> Heretofore, federal courts have allowed very few exceptions to the Fourth Amendment requirement that law enforcement officers possess at least articulable suspicion before stopping a vehicle: namely, at fixed checkpoints near border crossings to preclude illegal immigration, *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); and at fixed and temporary checkpoints to ensure compliance with *traffic-related laws*, such as driver's license, vehicle registration and drunk driving laws, *see Michigan*

Dept. of State Police v. Sitz, 496 U.S. 444 (1990); *U.S. v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989).

This case, however, upholds temporary, unannounced roadblocks established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs. . .

During prohibition seventy years ago, the Supreme Court observed that "it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile *on the chance of* finding liquor. . . " *Carroll v. U.S.*, 267 U.S. 132 (1925). In my view, permitting law enforcement officers to stop every vehicle at a roadblock based on the mere possibility that one or more vehicles passing through will contain illegal drugs – evidence of a crime completely unrelated to highway safety – is similarly intolerable and unreasonable.

App. 16-17. Indeed, by failing to balance *all* of the interests – including the purpose of the roadblock – the Court below has written out of the law the principle that "an intrusion must be reasonably related in scope to the justification for commencing it." *Florida v. Royer*, 460 U.S. 491 (1983); *Warden v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

Turning to the importance of the specific questions presented herein, the first question raises the issue of whether state officials may engage in pretext to evade clearly settled constitutional prohibitions. The exceptional importance of that issue was discussed in the preceding section of this petition. At its heart, this issue involves the question of whether the Court will condone admitted and deliberate evasion of the law by law enforcement. Surely, such a weighty issue is deserving of review by this Court.

The second question raises the issue of whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979). This issue, too, is quite important. As the *en banc* dissenters explained:

> in determining the reasonableness of the roadblock seizures, the panel does not consider *all* of the circumstances surrounding the seizures. Instead, it focuses exclusively on the driver license and vehicle registration aspects of the roadblocks. . . . By ignoring the primary purpose of the roadblocks – intercepting illegal drugs – and the effectiveness of the roadblocks in serving that purpose, the panel, in my view, fails to engage in a meaningful balancing under *Brown* and *Skinner*, and *loses sight of the historical concern with protecting*

> *citizens from wholesale governmental searches and seizures in the absence of probable cause or reasonable suspicion.*

App. 19 (emphasis supplied). The decision below has consequences far beyond its printed words: it authorizes any form of "Checkpoint Charlies" that law enforcement may choose to establish, so long as law enforcement simultaneously checks driver's licenses. Routine roadblocks in high crime areas to check for general evidence of crime are authorized by the decision below so long as the officers also check driver's licenses. Similarly, stops and inspections of all motorists leaving mall parking lots for evidence of shoplifting is also permissible, so long as driver licenses are checked. Such operations are authorized under the panel's analysis *regardless of their effectiveness and regardless of the hardships they may cause motorists.* As the *en banc* dissenters wrote:

> In my view, this opinion comes perilously close to permitting unfettered government intrusion on the privacy interests of all motorists.

App. 20. This virtually unfettered intrusion into Americans' privacy interests which is now permitted in the Eleventh Circuit is a weighty and important issue deserving of this Court's attention.

Indeed, the hardships caused motorists in this operation which went largely ignored in the court's analysis were constitutionally substantial. The court below acknowledged that many motorists were subjected to lengthy delays, but did not adequately acknowledge or weigh the disruption of class members' travel plans and

the many anecdotes involving dog bites, scratched cars, and motorists who were humiliated or put in fear. These interests have previously been considered important by this Court.

For example, this Court has given significant consideration to the disruption of travel plans when engaging in Fourth Amendment balancing. In *U.S. v. Place*, 462 U.S. 696 (1983), this Court held that the sniffing of luggage in an individual's custody at an airport was a seizure because it interfered with the individual's "liberty interest in proceeding with his itinerary":

> [I]n the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as the liberty interest in proceeding with his itinerary . . . [S]uch a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause.

Inadequate – if any – weight is given to this important interest in the analysis conducted by the court below.

Nor does the court below meaningfully consider the fact that this operation also subjected many innocent people to fear and humiliation by forcing them to undergo inspection of their vehicles and contents – *including the occupants* – by large dogs. Although this Court has generally approved the use of canines to sniff for drugs – generally upon reasonable suspicion – it has never before upheld the use of canines to stop and sniff people *without any suspicion. See U.S. v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied sub nom Fisher v. U.S.*, 106 S.Ct. 66 (1986)(dog sniff outside of an individual's apartment was a search requiring Fourth Amendment justification); *Lowery, The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1246-47 (1983) ("the very act of being subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst to the innocent sniffee"). The significance of this intrusion is amplified by the unreliability of the dogs. The undeniable fact is that these dogs were correct in but 1 of 28 instances because they will alert to odors which may or may not correspond to the presence of drugs.[17]

As Judge Reinhardt wrote in *U.S. v. Dicesare*, 765 F.2d 890 (9th Cir. 1986):

> [T]he critical question in every fourth amendment case is whether the intrusion at issue is one that a free society is willing to tolerate. There can be no question that a substantial difference exists between a peace officer, on whom

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[17] This is particularly problematical when much of our U.S. currency is contaminated by trace amounts of cocaine. *See* note 9, *supra*.

we have conferred the law enforcement authority of the state and who is at least familiar with the rudiments of fourth amendment protections, and a dog. A peace officer is clearly capable of conducting himself with the bounds of the Constitution if he wants to do so. It is, of course, unreasonable for us to expect a dog, even one trained by our finest police or customs officials, to appreciate the finer contours of the fourth amendment.

That trained canines may act merely as "instruments" of investigating officers does not, in my view, diminish the offensive character of the intrusion. History is replete with incidents in which dogs, acting as instruments of the state, have invaded people's rights in furtherance of the state's interest. In the antebellum South, dogs were used to ferret out blacks who sought little more than the same "free society" that the Fourth Amendment protects. During World War II, dogs were used in Nazi Germany to help locate Jews so that they could become a part of Hitler's "Final Solution". Although the state of affairs has changed somewhat since these events transpired, the image

> of the police state is as clear now as it was then.

Thus, neither the purpose of the roadblock, its effectiveness in achieving its primary goal, nor many important interests of class members were weighed by the court below. The result was the application of a balancing test where the weights on one side of the scale had their inner cores removed before the balancing began. There was then no *real* balancing, as required by *Brown v. Texas, supra*. This radically new approach to the balancing test raises an issue worthy of this Court's review.

The third important issue raised by this petition is whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and canine sniffs. The court below held that the ability to turn around and be subjected to a license check and dog sniff somehow makes the encounter something less than a seizure. However, as the *en banc* dissenters wrote, "freedom to leave the line means freedom to leave the line without being stopped." App. 20.

Motorists were seized by these roadblocks because a reasonable person would believe that he or she was not free to leave. This has always been the test of whether a person is seized for purposes of the Fourth Amendment. *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

Regardless of whether a motorist could theoretically turn around (and still be subject to the roadblock checks), there was no *real* freedom to leave because most motorists had important destinations to reach and

there was no other way to get there but wait it out. Mr. Merrett, for example, was not about to leave his 8½ month pregnant wife waiting on a street corner while he turned around and went home. Moreover, it is a criminal offense in Florida to attempt to flee once lawfully stopped by law enforcement.[18] Also, common sense tells us that a reasonable person, *forced* to come to a stop by the authority of law enforcement officers, would not believe that he is free to turn around and avoid the apparently lawful command. Such a belief was reinforced by the presence of the "chase" car, designed to stop anyone who tried to leave. Perhaps the best indication that class members felt that they were required to wait is that only a handful even attempted to turn around, and at least one of those was made to get back in line. Class members, like the officers, are well aware that if they were to attempt to turn around, it would be presumed that they had committed a criminal offense, which could result in additional delays and searches.

The Fourth Amendment's prohibition on unreasonable seizures has at its heart the prohibition on government's unreasonable interference with the freedom of movement. *E.g., Brower v. City of Inyou,* 489 U.S. 593, 597 (1989). In *U.S. v. Martinez-Fuerte,* 428 U.S. 543, 557 (1976), this Court explained that the Fourth Amendment embraces a motorist's right to "free passage without interruption." These important interests are at stake in this case. The determination of the court below that persons subject to roadblocks are not "seized" is a direct affront to the continued existence of a motorist's right to "free passage without interruption." Indeed, the decision below seriously alters the entire

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[18] See Section 316.1935, Florida Statutes (1995).

heretofore well-settled definition of the term "seizure" in Fourth Amendment jurisprudence.

Finally, this petition raises the issue of whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances. This Court has always *assumed* that canines are accurate because the cases usually reach the courts following a successful canine search. However, this is not the first time where factual scenarios have called into question whether canine sniffs give rise to probable cause. The 4% success rate here is nowhere close to "probable". *See U.S. v. Brown*, 731 F.2d 1491, 1492 n.1 (11th Cir. 1984); *Horton v. Goose Creek Independent School District*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) ("if a dog alerts a hundred times and there is no contraband on ninety of those occasions (a success rate of 10%), then an alert conceivably might not arouse a reasonable suspicion").

This issue is important because Respondents have promised to repeat this operation and, with the blessings of the court below, law enforcement around the country is likely to adopt these tactics, potentially affecting millions of citizens. Based on evidence which proved to be little more reliable than a divining rod, these millions of Americans are subject to extensive searches by governmental officials. In the case of 27 innocent class members below, every crevice of their vehicles were checked, their personal belongings were carefully examined, small containers within their vehicles were examined, and sometimes, they were patted down and asked to empty their pockets. R-6-122-L. The important question concerning the evidence necessary to justify such a major intrusion into citizens'

lives is worthy of consideration by this Court.

The importance and constitutional magnitude of this entire case was explained well in *State v. Smith*, 674 P. 2d 562, 564-65 (Okl. 1984), referring to another roadblock:

> The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal . . . draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an 'end justifies the means' approach . . . [A] basic tenet of American jurisprudence is that the government cannot *assume* criminal conduct in effectuating a stop such as the one presented herein. Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar sops for searching out other types of criminal offenders. For example, it is well known to the public that shoplifting is an everyday occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish fixed checkpoints, permanent or

> otherwise, outside of every shopping center in the area to question all exiting shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts or be subject to arrest every time they go shopping? The potential for abuse is apparent.

As the *en banc* dissenters wrote, the decision below

> makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire Court.

App. 16. Petitioners agree.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD S. STAFMAN
Counsel for Petitioners

APRIL 1996

APPENDIX

TO

PETITION OF WRIT OF CERTIORARI

United States Court of Appeals,
Eleventh Circuit.

No. 93-2510.

John M. MERRETT,
Solomon Clayton, Jr., Cecelia A. Clayton,
Plaintiffs-Appellants,

v.

James T. MOORE, Commissioner, FDLE, Leonard Mellon, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, Lawrence Crow, Chief, Lakeland Police Dept., Jerald Vaughn,
Defendants-Appellees.

July 25, 1995.

Appeal from the United States District Court for the Northern District of Florida. (No. TCA 84-7198-WS), William Stafford, Judge.

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This case requires us to consider when, consistent with the Constitution, a state may establish roadblocks for the chief purpose of locating illegal drugs. This case arose out of roadblocks that Florida law enforcement officials established along state highways. Plaintiffs brought suit under 42

U.S.C. § 1983 claiming that their Fourth and Fourteenth Amendment rights were violated when their vehicles were stopped, sniffed by dogs, and in some cases, searched at these roadblocks. Because the roadblocks, as planned by defendants, were not unconstitutional, we affirm the district court's orders granting summary judgment against plaintiffs' claims.

Briefly stated, the undisputed facts of this case are as follows.[19] From 1982 through 1984, the Florida Department of Law Enforcement (FDLE) developed a series of operations intended to intercept illegal drugs on state highways. As part of the operation, FDLE officials proposed to set up temporary checkpoints along highways to stop all traffic and expose the cars to narcotic sniffing dogs. Because the FDLE has no authority to establish roadblocks, it asked for the assistance of the Florida Highway Patrol (FHP) to set up drivers' license checkpoints. FDLE officials also requested the assistance of K-9 units, each consisting of a narcotic sniffing dog and its handler, form the cities of Maitland, Lakeland, and Largo, Florida.

The joint operation plan, entitled "Interdiction of Illegal Narcotics, North Florida," called for roadblocks from 4:00 p.m. until 10:00 p.m. on January 11 and 12, 1984, at specific sites on four Florida highways near the Georgia state line. Six FHP troopers, one FHP investigator, five FDLE agents, and four or five K-9 units were assigned to each site. At a pre-operation briefing, all participants were given a copy of the Operation Plan and instructed about their respective responsibilities. The FHP troopers were responsible for traffic control and for stopping vehicles, checking obvious safety defects, and examining drivers' licenses and vehicle registrations. They were instructed to stop all traffic passing through the roadblocks until traffic

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[19] At a motions hearing before the district court, the parties told the court that no factual disputes existed and that the case could be decided by summary judgment.

became congested, in which case vehicles were to be waved through as necessary to avoid long backups.

The dog handlers were told that the outside of each car was to be sniffed by the dogs as FHP troopers checked the driver's license and vehicle registration. If a dog alerted to the presence of drugs or if license or registration problems were found, the car was directed to a location out of the flow of traffic. In the case of a dog alert, a second dog was supposed to check the outside of the car. If the second dog alerted, consent to search was requested; and, if refused, the driver was detained until a search warrant was obtained. FDLE agents worked with the dog handlers and were responsible for making decisions about vehicle searches if a dog alerted to the presence of drugs.

Other teams–each consisting of an FDLE agent, an FHP trooper, and K-9 unit–were directed to walk around vehicles parked in nearby rest areas and truck stops. If the dogs alerted, the driver was to be located and asked for consent to search.

During the operation, the Florida Department of Transportation set up traffic control devices including cones, warning signs, and flashing lights to direct motorists to the checkpoints. During the two day operation, approximately 2100 vehicles passed through the roadblocks of which roughly 1330 were stopped. With the vehicles checked by teams at the rest areas and truck stops, approximately 1,450 vehicles were sniffed by the dogs. The dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics. In addition, law enforcement officials issued sixty-one vehicle-related citations.

At the roadblocks, the actual encounter with the officers conducting the drivers' license checks lasted a few minutes. And, the dogs usually were able to sniff the exterior of the cars before the license and registration checks were completed. So, most people experienced only a slight delay. But, during rush hours, traffic backed up; and some

people waited thirty to forty-five minutes before arriving at the roadblock or being waved through. In general, vehicles were permitted to leave the lines approaching the roadblocks and to turn around, but not without first being stopped by a trooper and having their registrations and drivers' licenses checked. Still, in at least one instance, a driver was instructed to remain in the line. People whose vehicles were actually searched experienced longer delays. In addition, one car overheated; one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog.

Plaintiffs, a class of motorists stopped at the roadblocks, brought suit against state and local officials involved in the operation. Plaintiffs say the checkpoints violated their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures. Plaintiffs specifically sued defendants Robert Dempsey, the Commissioner of FDLE during the operation, and Robert Butterworth, the Director of the Florida Department of Highway Safety at the time, in their individual capacities, seeking compensatory and punitive damages. Plaintiffs also sued the police departments for the Florida cities of Lakeland, Maitland, and Largo and their Chiefs of Police for compensatory and punitive damages. In addition, plaintiffs sued the current Commissioner of FDLE, James Moore, and the current Director of the Department of Highway Safety, Fred Dickinson, in their official capacities, seeking declaratory and injunctive relief to prevent the state from conducting future roadblock operations.

The district court disposed of the case through a series of orders. First, the court dismissed the claim against the police chiefs and their city police departments on the grounds that the chiefs had not "knowingly conspired" to violate plaintiffs' rights and that the facts did not support imposing municipal liability. Next, the court addressed the merits of plaintiffs' constitutional claims and concluded that the operation, as planned, violated no constitutional rights.

In a later order, the court granted defendants Butterworth and Dempsey qualified immunity on the grounds that, at the time of the roadblocks, it was not clearly established that the operation violated plaintiffs' constitutional rights. The court also dismissed the claim against Moore and Dickinson because the planned operation did not–and in the future will not–authorize unconstitutional conduct.

The district court's orders contain no reversible errors of law. Everything stated in those orders will not be restated in this opinion; instead, we write to emphasize and to clarify some points raised by this case.

At the outset, plaintiffs contend that the State of Florida conducted the roadblock operation at issue for the purpose of exposing the cars to the drug sniffing dogs. So, plaintiffs claim the operation was an invalid pretextual seizure. We disagree.[20] That the chief (but not sole) purpose of the

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[20] For roving traffic patrol officers, this court has held that pretextual stops may violate the Constitution. We have said, in that context, the important question is, not whether some officer could have lawfully made the stop, but whether a reasonable officer would have made the stop in the absence of the illegitimate motive. See *United States v. Smith*, 799 F.2d 704, 708 (11th Cir.1986). But see *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir.1993) (rejecting Eleventh Circuit pretextual analysis and adopting "purely objective test" used in majority of circuits under which a stop is not invalid pretext as long as an officer could have made the stop).

Defendants have not tried to conceal the purposes of the roadblocks. That the chief (but not sole) purpose of the roadblocks in this case was to intercept drugs is undisputed. And, the Smith pretextual analysis pressed on us by plaintiffs does not control this case because a stop at a checkpoint such as a roadblock is fundamentally different from the roving patrol stops at issue in Smith and those decisions following that case. Those cases involve field-level law enforcement acts by individual officers acting on their own discretion. Smith indicates the unconstitutional act occurs when an officer selectively targets a particular person based on the officer's subjective belief, not amounting to probable cause, that the person engaged in unlawful conduct other than a traffic violation.

As the Supreme Court has noted, roadblocks are different from roving

roadblocks in this case was to intercept drugs is undisputed. That the state had the authority to conduct roadblocks to check drivers' license and vehicle registration is also undisputed. We conclude that, where the state has one lawful purpose sufficient to justify a roadblock, that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional. In other words, we adopt a totally objective rule: a state may conduct a mixed-motive roadblock as long as one purpose presented for the roadblock could validly justify the roadblock, even if no roadblock would have been put in place but for the state's desire to hunt for unlawful drugs.[21]

Our holding that the state of Florida, in principle, has the authority to conduct some roadblocks, at which drugs are sought, does not conclude our consideration of this

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patrols. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (distinguishing roving patrol stops and roadblock stops, in part, because roadblocks limit officer's discretion); *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979) (recognizing that roadblocks avoid "standardless and unconstrained discretion" present in individual stops). At roadblocks, the stop involves no individual discretion of officers in the field. State law enforcement decision-makers decide as a policy matter to conduct the operation. And, everyone traveling on the road at the time of the operation is stopped and subjected, at least initially, to the same investigation. So, one officer's individual discretion does not affect the determination of who is stopped. Because police officer discretion is not at the heart of the roadblock stop, no selective targeting occurs; and, the pretext analysis, as set out in our precedents, does not fit the roadblock case. We think a different rule is justified, and we will not extend those precedents to these circumstances.

[21] Courts have upheld the use of roadblocks to check drivers' licenses and vehicle registrations, *United States v. McFayden*, 865 F.2d 1306 (D.C.Cir.1989); to prevent the entry of illegal aliens, *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); and to check for drunk drivers, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), on the grounds that each was a valid state interest. No question is presented about whether a state can lawfully conduct a roadblock solely to intercept illegal drugs; and we leave that question open.

operation's constitutionality. Next, we must consider whether this operation–as planned or in the reality of its performance–violated plaintiffs' constitutional rights; that is, whether these roadblocks were reasonable in the light of the state's interest in conducting the roadblocks, the effectiveness of the operation in promoting that interest, and the level of intrusion on the individual's privacy caused by the checkpoints. *See Brown v. Texas*, 443 U.S. 47, 49-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979). At least to the extent the operation was conducted to ensure compliance with the state's driver licensing and vehicle registration laws, the operation advanced an important state interest. *See Delaware v. Prouse*, 440 U.S. 648, 657-58, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979).[22] And, that the operation's actual vehicle citation rate was 4.6%, significantly higher than the rates found acceptable in *Martinez-Fuerta* and *Sitz*, shows that the operation, as performed, effectively advanced the state's interest.[23]

Pursuant to the operational plan, no motorist was to be detained at the checkpoint–that is the location where the motorist encountered the officers–for longer than the time required to conduct a driver's license and registration check. The dogs were to circle the exterior of the car while the officers conducted the document inspection. So, the plan called for motorists to experience only a slight delay once they reached the checkpoint. Nothing in the record indicates that, during execution of the plan, motorists were detained at the checkpoint for longer than this anticipated delay.[24] The Supreme Court has upheld the

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[22] Plaintiffs argue that the purpose of finding illegal drugs is not related to the state's interest in highway safety. Again, the state has identified one legitimate state interest–license and registration enforcement–advanced by the operation; so, we need not consider other reasons motivating the state to conduct the operation.

[23] This percentage reflects the citation rate for vehicles checked at the roadblocks.

[24] Records of the time required to conduct the document inspection

constitutionality of brief roadblock seizures that lasted about twenty-five seconds at a sobriety checkpoint, *see Sitz*, 496 U.S. at 444-56, 110 S.Ct. at 2483-88, and seizures that lasted 3 to 5 minutes at an immigration checkpoint away from the border. *See Martinez-Fuerte*, 428 U.S. at 544-48, 96 S.Ct. at 3077-78. So, in this case, we believe the slight delay required to conduct the license check was no unreasonable delay.[25]

State planners anticipated the possibility of traffic backing up at the roadblocks; so, they instructed officers to wave cars through the checkpoints as necessary to avoid congestion. But, the record indicates that the officers on the spot did not always respond quickly to changing traffic patterns and at times did not allow traffic to pass through as instructed. During rush hour, traffic became congested; and some people waited up to 45 minutes before reaching the checkpoint or being waved through. Whether these people were "seized" while they *waited to reach the checkpoint* and, thus, whether their delay should be considered in assessing the reasonableness of the operation, depends on whether they reasonably believed they were not free to turn around and to avoid the checkpoint. The clock for assessing the reasonableness of the delay caused by the checkpoint begins to run when a reasonable person would believe he cannot leave the line and avoid the

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were not kept. But, statements by troopers conducting the stops, as well as a video tape of vehicles stopped at the roadblock on U.S. Highway 19, suggest that the document inspection and external sniff were often conducted in less than one minute.

[25] Drivers were directed to the side of the highway when a dog alerted to the presence of illegal drugs in their cars. These drivers experienced longer delays as a second dog sniffed their cars or their cars were searched or both. But, as the lower court held, an alert by a narcotics trained dog establishes probable cause to believe a car contains illegal narcotics. *See United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir.1990). So, the additional delay suffered by these people did not violate the Constitution. The delay suffered by people cited for license and registration violations also was not unconstitutional.

checkpoint. *See United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Governmental officials must pay special attention to traffic back-ups at roadblocks; this circumstance carries with it the greatest potential for constitutional violations and for liability for the violations.

Nothing in the record indicates that many or most waiting drivers believed they could not leave the line. In fact, the record indicates that, in general, drivers were permitted to leave the line, but not without first being stopped by a trooper, having their license and registration checked, and perhaps having their vehicles sniffed by dogs. Assuming the resulting delay to these drivers (the ones who left the line) was no more than a few minutes–and we have no evidence to the contrary, these motorists were not seized for an unreasonable period of time.[26] But, at least one motorist was told that he could not leave the line. This motorist was seemingly seized during the entire 20 minutes he was required to remain in the line.[27] Such delay seems too long and, given the circumstances, might violate the Constitution. But, no other violations are supported by the record.[28]

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[26] At the rest areas and truck stops, each of the cars sniffed by the dogs was parked. No moving vehicles were stopped; and in the absence of an alert by a dog, vehicle operators were not detained. So, most of the conduct of the officers at the rest areas and truck stops did not constitute a seizure.

[27] We note that even this person, when his car overheated, was permitted ultimately to turn around and leave the line before reaching the actual roadblock.

[28] The record pertaining to whether people waiting in line believed they could turn around is not extensive. Officers conducting the roadblocks said that drivers were permitted to turn around and to avoid the checkpoint after being stopped and having their drivers' licenses and vehicle registrations checked. Out of the more than 2100 vehicles to pass through the roadblock, plaintiffs provide affidavits of only two drivers who attempted to turn around. And, both of these drivers were permitted to leave the line before reaching the checkpoint. One was

Plaintiffs contend that, regardless of the constitutionality of the roadblocks by themselves, the use of dogs to sniff the

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allowed to leave after being stopped and questioned; and the other, although originally told to remain in the line, was permitted to leave when he experienced car trouble. Plaintiffs provide no affidavits of drivers who wanted to turn around but believed they were required to remain in the line and, therefore, remained in line until they reached the checkpoint.

In addition, plaintiffs claim that the presence of a trooper in a "chase" car stationed behind the cars approaching the roadblock suggests that a reasonable person would not believe he could turn around. But, we think this circumstance is not probative. The presence of the chase car just as likely assures motorists that they can expedite their confrontation with law enforcement by turning around: a person waiting in line would know that he, without waiting to reach the roadblock, could talk to a police officer quickly if he needed or wanted to do so. And, the record indicates that the chase car is stationed by police at the back of the line because, in the light of their past experience, turn arounds are very common and expected at roadblocks. This practice and experience suggest that people waiting at roadblocks believe they are free to turn around.

Plaintiffs also claim that a reasonable person would not believe he was free to turn around for fear he could be prosecuted under Florida Statute section 316.1935. But, that statute makes it a crime for a person to evade or elude a police officer after having been ordered to stop. By its terms, the statute, to say the least, does not plainly apply to the line of traffic not yet at the roadblock; and no reported cases suggest that a motorist would violate Florida law by attempting to turn around before reaching the roadblock. Nothing in the record indicates that the State of Florida has a practice of prosecuting drivers under this statute for turning around at roadblocks. And, plaintiffs present the affidavits of no drivers who wanted to turn around but say they did not do so for fear of prosecution under the statute.

Also, nothing in the record suggests that the physical terrain prevented motorists from turning around. In fact, the record indicates that the highway medians in the areas of the roadblocks were flat and dry, thus, facilitating attempts to turn around.

In district court, plaintiffs stated that the record was sufficient to decide their claims on summary judgment. But, plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around.

exterior of their cars without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search. In *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the Supreme Court determined that, because a canine sniff of a person's luggage indicated only the presence or absence of contraband, the canine sniff was only minimally intrusive and was no "search" within the meaning of the Fourth Amendment. *Id.* at 706-09, 103 S.Ct. at 2644-45.[29]

Here, the dogs sniffed the exterior of plaintiffs' vehicles; they did not invade plaintiffs' homes or their bodily integrity. The sniffs occurred while plaintiffs were lawfully stopped in a public place; and because the sniffs occurred during the license check, plaintiffs were not delayed to conduct the sniffs. The sniffs also alerted the officers only to the potential presence of drugs; they did not expose the contents of plaintiffs' vehicles to public view. (And, the privacy interest in possessing illegal drugs is not one that society recognizes as reasonable. *United States v. Jacobsen*, 466 U.S. 109, 121-25, 104 S.Ct. 1652, 1661-62, 80 L.Ed.2d 85 (1984).) As in *Place*, the external sniff of plaintiffs' vehicles was not a search within the meaning of the Fourth Amendment.[30] So long as the use of the dogs did not make

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[29] Plaintiffs argue that the Court's holding in *Place* should be limited to sniffs of *unattended* property and that this court should follow the reasoning of the Second Circuit in *United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985), which held that a dog sniff outside a person's apartment was a search requiring Fourth Amendment protection. *Id.* at 1367.

We reject plaintiffs' claim. A person's privacy interest in his automobile on a public road is less than a person's privacy interest in his residence. The use of the dogs on the exterior of the cars constitutes no search. *See United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993) (sniff of vehicles exterior no search); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990) (same); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir.1991) (same).

[30] In a similar way, the rest areas are public places; and the truck stops, although private, were checked with the consent of a manager. So, the

the delay caused by the roadblocks unreasonable–and we have no evidence to the contrary, the state's decision to use dogs at the roadblocks does not make the operation unconstitutional.

In summary, the balance of the state's interest in enforcing its license and registration requirements, the extent to which the roadblocks furthered that interest, and the degree of intrusion on individual motorists who experienced only slight delays weigh in favor of the state program. We therefore hold that the operation, as planned, did not violate the Constitution. And, in the case of most motorists, the roadblocks were in reality conducted consistently with the Fourth and Fourteenth Amendments. But, in the limited instances of motorists who were delayed for significantly more than the brief time it took to conduct the license check and who were told they could not turn around and leave the line before reaching the roadblock, the roadblocks could constitute an unreasonable seizure.

Our conclusion that at least one motorists might have suffered constitutional deprivation does not entitle plaintiffs to relief against defendants. The supposed constitutional violation–an unreasonable delay–occurred when, in violation of the official plan, individual officers (who are not defendants here) failed to let traffic pass through the roadblocks. Defendants Dempsey and Butterworth cannot be held vicariously liable for unauthorized acts of their subordinates: the doctrine of respondeat superior is unavailable under section 1983. *See Monell v. Department of Social Services*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).[31]

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use of the dogs on the exterior of cars parked at these places did not constitute a search.

[31] And, because the operation violated no clearly established law, Dempsey and Butterworth are entitled to qualified immunity in their individual capacities. *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir.1994).

The judgment of the district court is AFFIRMED.[32]

---

[32] Plaintiffs also seek prospective relief against defendants Moore and Dickinson to prevent the use of similar roadblocks in the future. Because the roadblock plan is not unconstitutional on its face, plaintiffs lack standing to bring a claim for prospective relief. *See Kerr v. West Palm Beach*, 875 F.2d 1546, 1553-54 (11th Cir.1989).

The city police chiefs' mere acquiescence in what appeared to be a legitimate state act is insufficient to find that they conspired to establish the roadblocks. *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.1983). And, because no city officials made specific choices about a course of conduct during the operation, municipal liability cannot be imposed on the city defendants. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480-84, 106 S.Ct. 1292, 1299-1300, 89 L.Ed.2d 452 (1988).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2510

JOHN M. MERRETT, SOLOMON CLAYTON, CECELIA A. CLAYTON,

Plaintiffs-Appellants,

versus

JAMES T. MOORE, Commissioner, FDLE, LEONARD MELLON, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, LAWRENCE CROW, Chief, Lakeland Police Dept., JERALD VAUGHN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by Appellants John M. Merrett, Cecelia A. Clayton, and Solomon Clayton is DENIED.

The panel was aware that the Tenth Circuit reached a different result in a somewhat similar case: United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992). We were not persuaded by that opinion.

United States Court of Appeals,

Eleventh Circuit.

No. 93-2510.

John M. MERRETT, Solomon Clayton, Jr., Cecelia A. Clayton, Plaintiffs-Appellants,

v.

James T. MOORE, Commissioner, FDLE, Leonard Mellon, Exec. Director, Florida Dept. of Highway Safety & Motor Vehicles, Lawrence Crow, Chief, Lakeland Police Dept., Jerald Vaughn, Defendants-Appellees.

Feb. 26, 1996.

Appeal from the United States District Court for the Northern District of Florida (No. TCA 84-7198-WS); William Stafford, Judge.

ON PETITION FOR REHEARING EN BANC

(Opinion July 25, 1995, 11th Cir., 58 F.3d 1547)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

BARKETT, Circuit Judge, dissenting, in which KRAVITCH and HATCHETT, Circuit Judges, join:

I respectfully dissent from the court's denial of *en banc* rehearing in this case, which makes us the first circuit court in the country to legalize roadblocks to intercept illegal drugs. Such a case deserves careful consideration by the entire court.

Heretofore, federal courts have allowed very few exceptions to the Fourth Amendment requirement that law enforcement officers possess at least articulable suspicion before stopping a vehicle: namely, at fixed checkpoints near border crossings to preclude illegal immigration, *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67, 96 S.Ct. 3074, 3086-87, 49 L.Ed.2d 1116 (1976); and at fixed and temporary checkpoints to ensure compliance with *traffic-related laws*, such as driver license, vehicle registration and drunk driving laws, *see Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 2488, 110 L.Ed.2d 412 (1990); *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C.Cir.1989).

This case, however, upholds temporary, unannounced roadblocks established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs. While law enforcement officers checked driver licenses and

vehicle registrations at the roadblocks, other officers walked drug dogs around the vehicles to sniff for illegal drugs. Motorists could not leave the line leading up to a roadblock without being chased down by an officer and subjected to a license and registration check and a drug-dog sniff of their vehicles. Illegal drugs were found in only one of the 1300 vehicles stopped.

During prohibition seventy years ago, the Supreme Court observed that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile *on the chance of* finding liquor...." *Carroll v. United States*, 267 U.S. 132, 153-54, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925) (emphasis added). In my view, permitting law enforcement officers to stop every vehicle at a roadblock based on the mere possibility that one or more of the vehicles passing through will contain illegal drugs–evidence of a crime completely unrelated to highway safety–is similarly intolerable and unreasonable. The *en banc* court should carefully consider the ramifications of extending the roadblock exception to permit such roadblocks.

Likewise, the entire court should consider the following conclusions underlying the opinion:

I. A roadblock established on the pretext of ensuring compliance with traffic-related laws, but admittedly designed to intercept illegal drugs, is not unreasonably pretextual and therefore unconstitutional;

II. The reasonableness of a roadblock seizure can be determined under the balancing test of *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), without giving any consideration to the roadblock's primary purpose–the interception of illegal drugs–or to

the roadblock's effectiveness, or lack thereof, in serving that purpose; and

III. A motorist in a line leading up to a roadblock is not "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to a license and registration check and the car to a canine sniff.

I

The panel holds that "where the state has one lawful purpose sufficient to justify a roadblock [such as a license and registration check], that the state also uses the roadblock to intercept illegal drugs does *not* render the roadblock unconstitutional." *Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir.1995). Under our longstanding precedent, however, when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. *See, e.g., United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *Amador-Gonzalez v. United States*, 391 F.2d 308, 313 (5th Cir.1968).

In this case, the government conceded that it would not have established the roadblocks absent its desire to intercept drugs. The panel, however, finds our pretext cases inapplicable because they involved roving rather than roadblock stops. The panel reasons that because "one officer's individual discretion does not affect the determination of who is stopped [at roadblocks] ..., the pretext analysis, as set out in our [roving patrol] precedents, does not fit...." *Merrett*, 58 F.3d at 1550 n.

2.

Police officer discretion is not the primary concern of our pretext cases, however. While these cases recognize the danger posed by the discretion exercised by officers on roving patrol, they are grounded on the more fundamental concern that officers will attempt to evade the requirements of the Fourth Amendment by using a traffic stop to detain someone for a purpose that would not lawfully support a detention. In both cases, "the police engage[ ] in a deliberate scheme to evade the requirements of the Fourth Amendment...." *Amador-Gonzalez,* 391 F.2d at 314 (quotation omitted). Moreover, the problem with discretion continues to exist with roadblocks, but at a higher level. A discriminatory purpose easily could lead to the establishment of roadblocks at the ingress or egress to particularly unfavored neighborhoods.

Although the Supreme Court has not directly considered the question of pretextual stops, it has indicated that this type of roadblock is unreasonably pretextual and therefore unconstitutional. In *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the Court reviewed a decision where a court had suppressed evidence seized at a roadblock on the ground that the officer had to change his position in order to see the evidence, allegedly rendering the plain-view doctrine inapplicable. *Id.* at 734-35, 103 S.Ct. at 1539-40. Holding that the plain view doctrine did apply, the Court emphasized that there was "no suggestion that the roadblock was a pretext whereby evidence of [a] narcotics violation might be uncovered in "plain view' in the course of a check for driver's licenses." *Id.* at 743, 103 S.Ct. at 1544; *see also South Dakota v. Opperman,* 428 U.S. 364, 376, 96 S.Ct.

3092, 3100, 49 L.Ed.2d 1000 (1976) (upholding inventory search because "there is no suggestion whatever that this standard procedure ... was a pretext concealing an investigatory police motive").

As the Tenth Circuit explained in *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir.1992), when considering a roadblock identical to the ones before us, "[i]t would seem to follow [from the opinion in *Texas v. Brown*] that had the roadblock [there], which was designed to check for driver's licenses and registration, been but a pretext to look for "plain view" evidence of more serious crimes, the seizure of the [evidence] would have constituted a violation under the Fourth Amendment." *Id.* at 152. Applying *Brown*, the court reasoned as follows: "[h]aving concluded that the primary reason for the roadblock stop of Zamora's car was not to check her driver's license, but to ascertain, with the aid of an ever-present sniffing canine, whether she possessed drugs, it follows that the stop was pretextual and all that occurred thereafter was tainted." *Id.* at 153; *see also McFayden*, 865 F.2d at 1312-13 (observing that driver license roadblock could be conducted in a way indicating that its principal purpose was to detect crimes unrelated to licensing, in which case "a subterfuge might result in an infringement of Fourth Amendment rights").

II

The panel also holds that the roadblock seizures were reasonable under the test set forth in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Under this test, the reasonableness of a seizure is determined by balancing "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the

severity of the interference with individual liberty." *Id.* at 51, 99 S.Ct. at 2640. The Supreme Court has explained that "[w]hat is reasonable, of course, depends on *all* of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 (1989) (emphasis added; quotation omitted).

In determining the reasonableness of the roadblock seizures, however, the panel does not consider *all* of the circumstances surrounding the seizures. Instead, it focuses *exclusively* on the driver license and vehicle registration aspects of the roadblocks, that is, on the public's interest in ensuring compliance with license and registration laws and on the roadblock's effectiveness in advancing that interest. *See Merrett,* 58 F.3d at 1551-53. By ignoring the primary purpose of the roadblocks–intercepting illegal drugs–and the ineffectiveness of the roadblocks in serving that purpose, the panel, in my view, fails to engage in a meaningful balancing under *Brown* and *Skinner,* and loses sight of the historical concern with protecting citizens from wholesale governmental searches and seizures in the absence of probable cause or reasonable suspicion.

III

Finally, the panel concludes that the intrusiveness of the roadblocks was minimal, largely because it finds that the motorists were "seized" only after they reached the front of the line leading up to the roadblocks. The motorists were seized while *waiting* in line, however, if "the police conduct would have communicated to a reasonable [motorist] that the [motorist] was not free" to leave the line. *Florida v. Bostick,* 501 U.S. 429, 439,

111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991); *United States v. Mendenhall*, 446 U.S. 544, 551-55, 100 S.Ct. 1870, 1875-78, 64 L.Ed.2d 497 (1980).

The evidence showed that before reaching the actual roadblocks, some motorists waited in line for up to forty-five minutes (during rush hour) with no viable alternate routes and an officer in a chase car positioned to stop any motorist attempting to leave. The evidence further showed that motorists who left the line were stopped by an officer and subjected to license and registration checks and drug-dog sniffs of their cars. It seems pretty clear to me that this evidence, viewed in the light most favorable to the motorists, supports a finding that a reasonable motorist would not have felt free to leave the line.

The panel reasons that the presence of the chase car "just as likely assures motorists that they can expedite their confrontation with law enforcement by turning around." *Merrett*, 58 F.3d at 1552 n. 10. *Expediting* the encounter, however, is not the same as *ending* the encounter. In my view, freedom to leave the line means freedom to leave the line without being stopped. *See Bostick*, 501 U.S. at 439, 111 S.Ct. at 2389 (emphasizing that defendant may not have been seized because he might have felt free to "terminate the encounter"); *Mendenhall*, 446 U.S. at 555, 100 S.Ct. at 1878 (finding no seizure where defendant had no reason to believe "she was not free to end the conversation [with law enforcement officers] ... and *proceed on her way* ") (emphasis added). Thus, a reasonable factfinder could find that the motorists were seized not only at the roadblock, but also while waiting in line, significantly increasing the intrusiveness of the seizures.

I believe the panel further minimizes the intrusiveness of the roadblocks by limiting its intrusiveness analysis to the stop's duration. In *Sitz*, the Supreme Court confirmed that a stop's intrusiveness on motorists' privacy interests is not limited to the duration of the stop, but includes "the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Sitz*, 496 U.S. at 452, 110 S.Ct. at 2486; *see also Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414 (holding that reasonableness of seizure depends on *all* surrounding circumstances). The temporary, unannounced roadblocks in this case were set up in such a way that motorists could not avoid an encounter involving numerous officers handling aggressive police dogs; indeed, at least one motorist was attacked by a dog. The panel's analysis, however, does not consider the fear and surprise that such a sight would engender in a law-abiding motorist.

IV

As the Supreme Court has observed,

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion

> every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Delaware v. Prouse, 440 U.S. 648, 662-63, 99 S.Ct. 1391, 1400-01, 59 L.Ed.2d 660 (1979). In my view, this opinion comes perilously close to permitting unfettered government intrusion on the privacy interests of all motorists. For this reason and those discussed above, I would grant rehearing *en banc*.

Supreme Court, U.S.
FILED
JUN 7 1996
CLERK

(2)

No. 95-1842

IN THE

Supreme Court of the United States

October Term, 1995

JOHN M. MERRETT AND CECILIA A. CLAYTON, as personal representative of the estate of Solomon Clayton, Jr., on their behalf and on behalf of all others similarly situated,

Petitioners

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement; ROBERT DEMPSEY, individually; FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; ROBERT BUTTERWORTH; and LAWRENCE CROW, JOHN M. ERVIN, and JERALD VAUGHN; CITY of LAKELAND POLICE DEPARTMENT; CITY of MAITLAND POLICE DEPARTMENT; and CITY of LARGO POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS MOORE, DEMPSEY, DICKINSON AND BUTTERWORTH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 95-1842

IN THE

Supreme Court of the United States

October Term, 1995

JOHN M. MERRETT AND CECILIA A. CLAYTON, as personal representative of the estate of Solomon Clayton, Jr., on their behalf and on behalf of all others similarly situated,

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v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement; ROBERT DEMPSEY, individually; FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; ROBERT BUTTERWORTH; and LAWRENCE CROW, JOHN M. ERVIN, and JERALD VAUGHN; CITY of LAKELAND POLICE DEPARTMENT; CITY of MAITLAND POLICE DEPARTMENT; and CITY of LARGO POLICE DEPARTMENT,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS MOORE, DEMPSEY, DICKINSON AND BUTTERWORTH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioners seek an advisory opinion that future roadblocks — if conducted under old procedures already modified — would be unreasonable. Any conflict with *U.S. v. Morales-Zamora*,

974 F.2d 149 (10th Cir. 1992) is not worthy of certiorari review, because the facts establishing such conflict will not recur.[1]

Petitioners ignore facts which strongly contradict the alleged need for certiorari review of this case.[2] Before the roadblocks at issue took place (January 1984), the Florida Department of Law Enforcement (FDLE) and other agencies developed a "joint operation plan, entitled Interdiction of Illegal Narcotics, North Florida." *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) [internal quotes omitted]. Thus, the objective of drug interdiction was acknowledged, and not hidden, from the earliest reasonable opportunity.

The roadblocks were a unique event happening over 12 years ago. Later, FDLE represented to the district court that any future roadblock employing sniff dogs would be conducted in a substantially different manner. Robert L. Edwards, in a sworn affidavit,[3] specified twenty-two ways in which any such roadblock would be changed. Prominent among the changes were: (1) advance site selection and planning to reduce field officer discretion, (2) sufficient drug dogs to permit 15 minute work intervals, (3) smaller-scale and briefer checkpoints, (4) written standards for "turnarounds," (5) advice to motorists about the dogs, (6) periodic

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1 None of the questions presented implicate Respondents Crow, Erwin and Vaughn; the police chiefs for Respondent cities of Lakeland, Maitland, and Largo. Petitioners have, in effect, accepted the Eleventh Circuit's decision exonerating these Respondents, who did no more than provide sniff-dogs for use at the roadblocks.

2 Respondents object to Petitioners' statement, because it contains numerous argumentative footnotes portrayed as fact. *See* Stern & Gressman *Supreme Court Practice* (7th ed. 1993) at 353 ("the Statement of the Case is not the place for argument or editorializing"). Respondents trust this Court will ignore the argument improperly appearing in footnotes to Petitioners' statement.

3 The affidavit is reproduced as the Appendix. At the time, Edwards was the Director of the Division of Local Law Enforcement Assistance, FDLE. His affidavit was attached as Exhibit 1 to the "State Defendants' Cross Motion for Summary Judgment," part of the record at (R8-145-10-15).

checks by supervisors to relieve traffic congestion, and (7) advance publicity. [A-1–A-4][4]

Petitioners raised numerous issues before the 11th Circuit. However, only one — qualified immunity of Respondents Butterworth and Dempsey — addressed compensatory damages. The 11th Circuit held these Respondents[5] were entitled to qualified immunity. *Merrett*, 58 F.3d at 1554, n. 13. None of the questions presented to this Court broach or fairly include qualified immunity. *See Yee v. City of Escondido*, 503 U.S. 519, 535–39 (1992) (discussing the "significant consequences" of the framing of questions in a petition for certiorari, the Court's strong practice of not considering questions outside those presented, and concluding a new question as to regulatory taking was not fairly included in the presented question as to physical taking).

Not having presented a question as to qualified immunity, Petitioners have voluntarily precluded this Court from granting "tangible" relief. Consequently, any need for certiorari review is still further diminished.

ARGUMENT

I. ANY CONFLICT BETWEEN THIS CASE AND *MORALES-ZAMORA* IS NOT WORTHY OF CERTIORARI REVIEW

The undisputed facts reveal that the 1984 roadblocks were unique and non-recurring events. A high-ranking FDLE official filed his sworn statement describing numerous changes which would be made if sniff dogs were used in future roadblocks. These changes, not constitutionally required, confirm that the 1984 roadblocks are now of academic interest only. As

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4 The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

5 Respondents Moore and Dickinson were not sued individually.

unique and highly fact-bound events, the 1984 roadblocks do not factually support certiorari review.

Construed most favorably to Petitioners, the facts reveal only relatively minor, individual injustices. *See* Stern & Gressman, *supra* note 1 at 353 ("The Court will seldom grant certiorari to correct individual injustices"). Moreover, any such perceived injustices are very fact-specific. Each would be readily distinguishable in future cases, thereby militating against review of this case. *See* S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 616 (1984) (certiorari not justified when lower courts are divergent in an area of law, but cannot be "brought into line" through a decision by this Court turning exclusively on facts of a particular case).

In *Morales-Zamora*, the Tenth Circuit noted:

> At the same time, the government agrees that under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car. All of which narrows our problem.

Id. 974 F.2d at 151. Without arguing the merits, suffice it to say that the 10th Circuit did not consider whether the roadblock at issue was a dual-purpose roadblock, a point strongly urged by Respondents before the 11th Circuit (answer brief at p. 5–14).

Below, the district court observed:

> At least to this court, it is not abundantly clear that a preplanned, systematic and nondiscriminatory roadblock would be invalid just because it was set up for the lone purpose of interdicting narcotics traffic.

"Order" of May 17, 1992 at p. 15. (Pet. Lodging B, p. 15). In contrast to both the district court below and the Tenth Circuit, the 11th Circuit expressly left the question open. *Merrett*, 58 F.3d at 1551, note 3. Therefore, the refusal to follow *Morales-Zamora* reflects the 11th Circuit's unwillingness to reach an issue not before it, rather than a genuine conflict of decisions warranting certiorari review.

When the 11th Circuit panel denied rehearing, it said only that it was not persuaded by *Morales-Zamora*, a decision reached in a "somewhat similar case." The panel's decision, however, clearly indicates the record was factually insufficient to sustain Petitioners' claim of an unreasonable seizure. *See Merrett* 58 F.3d at 1552, note 10 (concluding that "plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around").

It follows that the panel felt the factual insufficiency of the record prevented the *Morales-Zamora* rationale from being persuasive. The same insufficiency undermines Petitioners' quest for certiorari.

Petitioners quote this passage from the dissent from denial of rehearing *en banc:*

> Under our long-standing precedent...when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. [italics original; citations omitted]

(petition, p. 15) Thus, as a central feature of their argument,[6] Petitioners advance a point of law that has been rejected by all but one of the federal circuits. *See U.S. v. Whren*, 53 F.3d 371, 375–6 (D.C.Cir. 1995), *cert. granted*, case no. 95-5841 (discussing the "would have" versus the "could have" standard and declining to adopt "the more open-ended 'would have' standard of the Tenth and Eleventh Circuits"); and *U.S. v. Botero-Ospina*, 71 F.3d 783, 787-8 (10th Cir. 1995) (*en banc*) (abandoning the "would have made the stop" test, and declaring a stop is valid if based on an observed traffic violation or reasonable suspicion). Now, only the 11th Circuit adheres to the "would have" test.

If this Court holds, in *Whren*, that the "could have" test meets the demands of the Fourth Amendment, then any vestige of need for certiorari review is eliminated. Even Petitioners conceded, before the 11th Circuit, that roadblocks for license checks were constitutional.[7] Since the roadblocks at issue certainly could have stopped cars for license checks, adoption of the "could have" test by this Court would foreclose any inquiry into pretext. It would render meaningless any perceived conflict between the decision below and *Morales-Zamora*.[8]

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6 Petitioners' heavy reliance on pretext stop cases illustrates the weakness of their argument, and the analytical flaw in the reasoning of the dissenters here. The concerns in pretext stop cases are founded on the constitutional issues raised by individual, roving stops; not stops, such as those here, effected in accord with pre-established guidelines.

7 In their initial brief (p. 21–22), Petitioners said:

> Although police roadblocks established to conduct license checks are lawful when properly conducted
>
> * * *
>
> Although FHP certainly could have conducted these license checks absent the FDLE's invalid purpose.

8 Perhaps because it weighs so heavily against Petitioners, the initial petition does not mention *Whren*. However, in their May 8 "Supplement to Petition for Writ of Certiorari," Petitioners offer improper argument on the merits, attempting to evade the effect of an unfavorable outcome in *Whren* (argued April 17, 1996).

The conflict urged by Petitioners is not supported by the record. To the contrary, the record indicates the roadblocks were factually unique and will not recur. If the 11th Circuit erred under such facts, its error is not one demanding immediate correction through certiorari.

Any future roadblocks employing dogs will be substantially different. Petitioners' argument is based on a factually insufficient record, and depends on a point of law already rejected by all but one federal circuit. Certiorari review is not warranted.

II. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND SHOULD BE DENIED.

The conflict perceived by Petitioners is illusory, as it is predicated on events that will not recur. This illusion permeates all four questions Petitioners claim are important enough for certiorari review.

Petitioners quote at length from the dissent from denial of rehearing *en banc,* for its apparent conclusion that fixed but temporary checkpoints are acceptable only to enforce traffic-related laws. This logic would preclude agricultural inspection stations, unless they are always operated at all times, because enforcement of laws regarding agricultural products has nothing to do with safety of the motoring public or compliance with vehicular laws.

QUESTION ONE

The first question[9] is not worthy of certiorari review. It implausibly assumes that law enforcement agencies, by deciding to enforce drug laws through a roadblock, are operating pretextually — regardless of the presence of a motor vehicle-related, constitutional purpose such as license checks.

Petitioners' argument for this question is but one short paragraph. (petition, p. 20) Without analysis, Petitioners rhetorically ask whether this "Court will condone admitted and deliberate evasion of the law." Petitioners' rhetoric is belied by their second question. There, Petitioners ask whether a roadblock "established for the *admitted* purpose of intercepting illegal drugs" [e.s.] is lawful. If drug interdiction is an "admitted" purpose, it cannot be pretextual.

The record shows Respondents always admitted their chief purpose was to intercept illegal drugs. Nevertheless, it is undisputed that Respondents also operated the roadblocks for checking drivers' licenses, vehicle registrations, and safety equipment. *Merrett* 58 F.3d at 1549. That the roadblocks' chief purpose was to intercept illegal drugs does not diminish the validity of the roadblock. Petitioners are attempting to transform the "street-level" pretext stop argument into an opportunity to attack law enforcement agencies at the planning and policy level. Such attempt was expressly prohibited by this Court in *Sitz:*

> But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives [for apprehending drunk drivers] remains with the governmental officials who have a unique understanding of, and a responsibility

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9 Petitioners' first question reads: "Whether a roadblock established on the pretext of ensuring compliance with traffic related laws, but admittedly designed to intercept illegal drugs, is unreasonably pretextual and therefore unconstitutional."

> for, limited public resources, including a finite number of police officers.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 453 (1990).

QUESTION TWO

Petitioners next urge:[10]

> the decision below...authorizes any form of [roadblocks]...so long as law enforcement simultaneously checks driver's licenses. [S]tops and inspections of all motorists leaving mall parking lots for evidence of shoplifting is also permissible, so long as driver licenses are checked."

(petition, p. 21) Petitioners ignore the fact that interstate drug trafficking by automobile is a well-known phenomenon, whereas interstate transport of shoplifted goods is not. Equally obvious, interstate drug trafficking is considered by law enforcement to be a far greater problem than shoplifting.

The roadblocks were premised on the fact that automobiles are commonly used to transport drugs. Thus, there was a substantial connection between the type of crime (drug trafficking) and the enforcement method (roadblock). This connection does not exist in Petitioners' conjecture about roadblocks for shoplifting and "general evidence of crime." (petition, p.21)

Should roadblocks ever be conducted for these purposes, the courts can respond accordingly and in context. Until a sufficient record is presented, this Court should not grant

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10 The second questions reads: "Whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979)."

certiorari to pass upon something that has not occurred and may never happen.

Petitioners continue their practice of relying on law that is not controlling or persuasive; that is, the *en banc* dissenters' characterization of the balancing test employed in *Brown v. Texas*, 443 U.S. 47 (1979). Then Petitioners vent their displeasure with the panel's decision:

> Indeed, the hardships caused motorists in this operation which went largely ignored in the court's analysis
>
> * * *
>
> Inadequate — if any — weight is given to this important interest [travel] in the analysis conducted by the court below. Nor does the court below meaningfully consider the fact that this operation also subjected many innocent people to fear and humiliation

(petition, p. 21–3) By immediately following the point about balancing, the above quoted language makes it clear Petitioners simply disagree with the lower court's rationale.

Also, Petitioners misunderstand the record. Rather than subjecting "many people to fear and humiliation" — a claim for which Petitioners cite no record support — the use of dogs to sniff the exterior of vehicles quickly eliminated all but 28 of the 1450 vehicles sniffed. *Id.* at 1549. Nothing in the record indicates any of the passengers in the 1422 eliminated vehicles were humiliated. In fact, nothing in the record indicates more than a few of the passengers in the 28 searched vehicles

were subject to fear or humiliation. Nothing indicates this fear or humiliation was a reasonable reaction.[11]

Again, Petitioners have not contested the Eleventh Circuit's holding as to qualified immunity. Petitioners' decision belies their claim of "hardships to motorists." Moreover, Petitioners' mischaracterization of the record cannot stand even casual scrutiny and presents no basis for certiorari review.

QUESTION THREE

Had they adduced sufficient evidence to provide a factual basis for this question, Petitioners might have raised a cognizable issue.[12] They did not. As the panel aptly explained, the record was insufficient to "permit a fact finder to find that a reasonable person would believe he was not free to turn around." *Id.*, 58 F.3d at 1552, note 10.

The decision below found it worthwhile to discuss only one event: the motorist who was told he could not leave the line, and thus was "seemingly seized" for the 20 minutes he was

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11 The opinion below noted that "one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog." 58 F.3d at 1549. These unintended mishaps may constitute tort claims, but are not of constitutional significance. *See Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) ("unintended consequences of government action could not form the basis for a fourth amendment violation"); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (use of dog to apprehend burglary suspect not excessive, when suspect died from being grabbed by neck, as no evidence indicated the handler intended such or that handler deviated from standard procedure; therefore, suspect's estate was precluded from recovery in a civil rights action); *Streetman v. Jordan*, 918 F.2d 555, 557 at n. 3 (5th Cir. 1990) (any injury suffered by person when police officers, during a search, confiscated electronic equipment, left food out to spoil, and left without turning off lights or locking door involved negligence and were not actionable under section 1983), *citing Daniels v. Williams, 474 U.S.* 327, 334, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986).

12 Petitioners' third question is: "Whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and a canine sniffs."

in the line. *Merrett,* 58 F.3d at 1552. But, as the panel concluded, "no other violations are supported by the record."[13]

Petitioners re-argue the merits. This, too, is not the basis on which certiorari review should rest.

QUESTION FOUR

This question[14] is the weakest of all. Petitioners contend the issue is "whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances."

Preliminarily, Petitioners have not challenged the adequacy of the dogs' training or the competence of the handlers. Rather, they rely on an after-the-fact observation that only 1 in 28 dog-alerts resulted in an *arrest* for drug possession. The flaw in this approach is obvious. It makes probable cause turn on an after-the-fact success ratio as determined by arrests, rather than the accuracy of alerts. Such ratio has nothing to do with whether an individual dog-alert, at the time it occurred, was reliable. Petitioners' logic must fail, as it is akin to urging the validity of arrests depends on the conviction rate. *See Marx v. Gumbinner,* 905 F.2d 1503, 1507 (11th Cir. 1990) ("[T]hat a defendant is subsequently acquitted or charges are dropped is of no consequence in determining the validity of the arrest itself").

Petitioners success ratio approach would foster much after-the-fact conjecture as to when a dog should not be considered reliable, and force officers to continually re-assess their conclusions of probable cause. The Fourth Amendment does not

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13 Respondents are not asking this Court to condone 20 minute seizures under any and all circumstances. However, the motorist was allowed to leave the line when his car overheated. *Id.* at 1552, note 9. At most, this is a classic example of an individual injustice not warranting certiorari.

14 Petitioners' last question asks: "Whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances."

require as much. *See Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir. 1986) ("[H]aving once determined that there is probable cause to arrest, an officer should not be required to reassess his probable cause conclusion at every turn.").

Ignoring the facts, Petitioners erroneously contend this "issue is important because Respondents have promised to repeat this operation." (petition, p.27) As described in the Edwards affidavit [A-1], any future roadblocks employing sniff dogs will be conducted in a substantially different manner. Moreover, Petitioners have never disputed this representation.

If future roadblocks were to violate the Fourth Amendment, the lower courts will deal with the violation within the ambit of decisions such as *Sitz; Brown v. Texas;* and *Horton v. California*, 496 U.S. 128 (1990). Petitioners' argument that "law enforcement around the country is likely to adopt these tactics" is conjectural at best, and not a basis for certiorari review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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A. Affidavit of Robert L. Edwards A-1

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

BEFORE ME, this day personally appeared ROBERT L. EDWARDS who, being first duly sworn, said on oath:

1. My name is Robert L. Edwards. I am the Director of the Division of Local Law Enforcement Assistance, Florida Department of Law Enforcement. In that capacity I have the authority, subject to approval of Commissioner Robert Dempsey, to prescribe guidelines and organizational plans for future license and vehicle equipment check/drug interdiction operations of the type last accomplished in January 1984.

2. Based upon after action reports following previous operations (copies attached hereto as Exhibits A, B, C and D), it is the intention of the Department of Law Enforcement to continue to observe the following guidelines in all future operations of this type:

(a) Basic procedure guidelines observed in the January 1984 operation will continue to be followed in the future.

(b) Advance site selection and planning will be accomplished by supervisors in this Department and in other participating agencies so as to minimize discretion on the part of officers in the field;

(c) Vehicles will be stopped in a pre-established systematic fashion;

(d) There will be sufficient display of the official law enforcement insignia to comfort the public;

(e) Motor vehicle and participant safety will continue to be of paramount importance;

(f) Sufficient numbers of narcotic trained detection dogs will be used to permit rotation at 15 minute intervals; handlers will be required to advise if individual dogs need additional rest or should otherwise be removed from the operation;

(g) The number of law enforcement personnel on site will be strictly limited to designated participants with prescribed roles;

(h) Future operations will be smaller in scale with briefer check points;

(I) Preoperational briefing and written guidelines are not intended to cover every conceivable contingency as such prescription would be self-defeating and would impair efficient and effective operation;

(j) Certain contingencies will be emphasized in future operations, including dogs will not be permitted in vehicles; dog alerts will be confirmed by a second dog alert before consent to search vehicle interior is sought;

(k) Standards for dealing with "turnarounds" will be established in writing;

(l) Supervisory personnel will determine in advance whether traffic flow in one or both directions will be blocked;

(m) Written records will be kept of all vehicles to which dogs alert, including tag number identification, documentation of consent, results of search, and explanations by vehicle

occupants, identification of participating law enforcement;

(n) All participating officers involved in vehicle searches will be furnished a check list of procedures to follow upon a dog alert;

(o) Prior to the commencement of each operation and approximately every 30 minutes thereafter while the operation continues, the roadway and shoulder in the vicinity of the check points will be checked for contraband;

(p) Contraband will be retained with the location and time of finding noted;

(q) Arrests or citations will be made for all law violations noted unless in the informed discretion of the supervisory officer in charge an arrest should not be made;

(r) Motorists will be advised of the purpose of the dogs' presence as soon as practical and will be told to keep their windows rolled up and not to lean out of their vehicle while the dog circles;

(s) Consent to search will be sought from vehicle occupants as before, with information that a search warrant will be sought from a judge if consent is withheld; Prior planning will be used to expedite the search warrant application process. Reliance on search warrants to permit vehicle search does not mean that FDLE believes a warrant would constitutionally be required under the circumstances here presented;

(t) Motorists producing a prescription drug as possible explanation for a dog alert will be

courteously acknowledged, but will be advised that, for the operation to be effective and non-discretionary, all vehicles on which an alert is confirmed must be searched;

(u) Searches will be brief, thorough, and will minimize inconvenience to the public.

(v) Periodic checks will be made by supervisory staff to determine how long vehicles are waiting in line prior to reaching the check point. "Wave throughs" will be made when supervisors deem appropriate under uniform standards to relieve traffic congestion;

(w) Advance publicity of the intention to conduct future operations will be released to alert the motoring public of the possibility of such operations without disclosing the precise times or locations;

3. The emergence of efficient, effective and constitutional law enforcement operations is an evolutionary process shaped by prior police experiences and the contours of case law. As was done with all prior drug interdiction operations, future operations will be scrutinized at their termination by participants and FILE administrators and attorneys, and proposals for further refinements will be made and considered.

/S/
ROBERT L. EDWARDS

[notarization and exhibits omitted]

Supreme Court, U.S.
FILED
JUN 11 1996
CLERK

(3)

No. 95-1842

IN THE

Supreme Court of the United States

October Term, 1995

JOHN M. MERRETT, AND CECILIA A. CLAYTON, as personal representative of the estate of Solomon Clayton, Jr., on their own behalf and on behalf of all others similarly situated,

Petitioners

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement; ROBERT DEMPSEY, individually; FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; ROBERT BUTTERWORTH; and LAWRENCE CROW; JOHN M. ERWIN; and JERALD VAUGHN; CITY OF LAKELAND POLICE DEPARTMENT; CITY OF MAITLAND POLICE DEPARTMENT; and CITY OF LARGO POLICE DEPARTMENT,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENTS LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITY OF LAKELAND POLICE DEPARTMENT, CITY OF MAITLAND POLICE DEPARTMENT, and CITY OF LARGO POLICE DEPARTMENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

None of the issues presented in this Petition for Writ of Certiorari apply to the Cities or the Chiefs.[1] With a broad brush Petitioners refer in their Argument to all Defendants below as "Respondents," despite the significant difference in the issues pertaining to the various Respondents.

Petitioners gloss over the posture of this case as it relates to the Cities and the Chiefs. Petitioners acknowledged the Chiefs "were not present at, and did not directly participate in, the roadblocks." (Petitioners' Lodging A at 5.) Their claims against the Chiefs and the Cities were based entirely on assertions the Chiefs and their Cities were liable as conspirators with the State Respondents for planning the roadblock and drug interdiction effort. Related to that issue, Petitioners claimed the Chiefs and Cities were liable because the Cities delegated final policymaking authority to their Chiefs.

After discovery, the Cities and the Chiefs filed a motion for summary judgment and Petitioners filed a cross-motion for summary judgment on the Chiefs' and Cities' liability. (Petitioners' Lodging A at 2.)[2]

The District Court granted summary judgment in favor of the Chiefs and the Cities on October 6, 1991, finding the

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1. Respondents Crow, Erwin, and Vaughn will be referred to herein as the "Chiefs." The City of Lakeland Police Department, City of Maitland Police Department, and City of Largo Police Department will be referred to herein as the "Cities." The remaining Respondents, James T. Moore, Robert Dempsey, Fred O. Dickinson, and Robert Butterworth, will be referred to herein as the "State Respondents."

2. At the District Court, Petitioners and all Respondents conceded no factual disputes existed and all issues could be decided by summary judgment. *Merrett v. Moore,* 58 F.3d 1547, 1549 n.1 (11th Cir. 1995).

uncontroverted evidence in this case revealed the roadblock and drug interdiction effort was "planned, coordinated, and supervised not by the Chiefs but by the FDLE in conjunction with the FHP and FDOT." (Petitioners' Lodging A at 9.) Therefore, as a matter of law, the evidence of record was insufficient to support Petitioners' allegations of conspiracy against the Chiefs and the Cities. Additionally there was nothing in the record indicating the Chiefs had any input whatsoever into the activities that took place during the January 1984 roadblocks in northern Florida, and therefore, there could be no liability imposed on their municipalities as a matter of law. Having decided there was no liability on the part of the Chiefs and Cities, the District Court found the question of the Chiefs' entitlement to qualified immunity raised on summary judgment moot. (Petitioners' Lodging A at 9-10.)

Similarly, District Court and the Eleventh Circuit found as a matter of law Respondents Dempsey and Butterworth were entitled to qualified immunity because at the time of the ro adblocks, it was not clearly established the operation violated Petitioners' constitutional rights. *Merrett v. Moore,* 58 F.3d 1547, 1553 (11th Cir. 1995). (Petitioners' Lodging C at 6-9.) Also, because the planned operation did not authorize unconstitutional conduct, Respondents Moore and Dickinson were not liable as a matter of law, and Petitioners lacked standing to bring a claim for prospective relief. *Merrett,* 58 F.3d at 1554 n. 14. (Petitioners' Lodging D at 5.)

Although Petitioners argued to the Eleventh Circuit that the District Court erred in finding no liability on the part of the Chiefs and the Cities, Petitioners did not raise that issue in their Motion for Rehearing and Suggestion for Rehearing En Banc filed with the appellate court. The Eleventh Circuit affirmed the District Court's ruling that

the Chiefs and the Cities were not liable as a matter of law.[3] *Merrett,* 58 F.3d at 1554 n.14. The dissenters to the denial of the Rehearing En Banc similarly only addressed the alleged constitutional violation issues directed toward the State Respondents, apparently agreeing with the panel's affirmance of the issues pertaining to the Chiefs and the Cities. (Petitioners' App. at 11-15.)

Even more significantly, Petitioners did not raise any issues relevant the Chiefs and the Cities in their Petition for Writ of Certiorari, failing to preserve those issues for review as required by Supreme Court Rule 14.1.(a).

Therefore, all the questions raised in the Petition for Writ of Certiorari pertain only to the State Respondents, with Petitioners having waived any issues pertaining to conspiracy to violate civil rights or municipal liability asserted against the Cities and the Chiefs. Sup. Ct. R. 14.1.(a).

Petitioners also omit for this Court's consideration the undisputed affidavit presented to the District Court executed by Robert L. Edwards, Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, wherein Mr. Edwards defined the changes that would be made in any future roadblocks, thereby precluding recurrence of the perceived injustices which may have occurred during these 1984 roadblocks.[4]

Although not mentioned in their Statement, on page 23 of the Petition, Petitioners refer to occupants being sniffed

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3. Of course, the Eleventh Circuit did not address the question of the Chiefs' qualified immunity because the District Court found that issue moot. However, if this case is remanded, the Chiefs will continue to maintain they are entitled to qualified immunity, an issue never reached by the District Court.

4. Mr. Edwards' Affidavit is reproduced as Appendix A to the State Respondents' Response to Petition for Writ of Certiorari.

by large dogs. Lacking evidence of occupants being sniffed, Petitioners cite nothing in the record to support this assertion. Additionally, Petitioners did not raise this issue for the Eleventh Circuit's consideration.[5]

Lastly, the Cities and Chiefs join in the objection raised by the State Respondents to Petitioners' numerous argumentative footnotes portrayed as fact in Petitioners' Statement. In particular, Petitioners' footnotes 9 and 11 should be disregarded by this Court because they improperly cite to case law and statutes to support these misplaced arguments.

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5. In fact, the Eleventh Circuit expressly stated the dogs did not invade the plaintiffs' bodily integrity. *Merrett,* 58 F.3d at 1553.

ARGUMENT

I. The Constitutional Issues Presented for Review in the Petition for Writ of Certiorari Do Not Apply to the Chiefs or Cities

The Petition for Writ of Certiorari omits for this Court's consideration any question concerning the grounds on which the District Court granted summary judgment in favor of the Cities and the Chiefs. The Petition also omits discussion of any claims of alleged constitutional violations committed by the Chiefs and the Cities. Likewise, the propriety of the District Court's summary judgment in favor of the Cities and the Chiefs, and the Eleventh Circuit's affirmance thereof, is not "fairly included" in the questions concerning alleged constitutional violations. Therefore Supreme Court Rule 14.1.(a) prohibits this Court from reaching those issues. *See Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 114 S.Ct. 425 (1993) (writ of certiorari was improvidently granted because in order to reach the merits, the Court would have to address a question that was neither presented in the petition for certiorari nor fairly included in question presented). Petitioners waived their right to further review of any issues pertaining to the liability of the Cities and the Chiefs, and have in fact accepted the summary judgment entered in favor of the Chiefs and the Cities by the District Court on October 6, 1991, affirmed by the Eleventh Circuit's opinion. *Merrett.* (Petitioners' Lodging A; Petitioners' App. 1-9.)

The District Court entered summary judgment in favor of the Chiefs and the Cities based on well-established law concerning what the Petitioners were required to prove to support their claim of conspiracy to deprive individuals of their civil rights. The District Court found the Petitioners

simply did not present enough evidence to defeat a motion for summary judgment:

> The **record contains not one shred of evidence** that the Chiefs agreed to violate or disregard the law.... The evidence demonstrates only that the Chiefs gave an appropriate response to a legitimate request by a fellow law enforcement agency. The evidence neither demonstrates nor suggests the Chiefs' involvement in a conspiracy to violate Plaintiffs' civil rights.

(Petitioners' Lodging A at 8) (emphasis added.)

With respect to Petitioners' claim of municipal liability, the District Court also found Petitioners failed to prove their case:

> In the absence of personal involvement or a conspiracy, the Chiefs and the Cities may still be liable for the alleged unlawful actions of the city police officers if the challenged actions — here the interdiction efforts — implemented or executed policies adopted and promulgated by the Chiefs pursuant to their final policymaking authority....
>
> The **uncontroverted evidence** in this case is that the interdiction effort was planned, coordinated, and supervised not by the Chiefs but by the FDLE in conjunction with the FHP and FDOT. **There is nothing in the record** to indicate that the Chiefs had any input whatsoever into the activities which took place in January of 1984 on the roads in northern Florida. The Chiefs were involved only because they affirmatively responded to a request by the FDLE to borrow dogs and dog handlers. How those dogs and dog handlers

were subsequently employed was determined by the FDLE....

(Petitioners' Lodging A at 8-9) (emphasis added.) The Eleventh Circuit agreed. Petitioners do not seek review of either of these issues. Having waived these issues for review by this Court, Petitioners should not have included the Chiefs and the Cities as Respondents in their Petition for Writ of Certiorari.

Therefore, this Court should not grant certiorari with respect to the Cities and the Chiefs.

II. The Decision Below Does Not Directly Conflict with *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992)

The *Morales-Zamora* decision does not involve the issues decided by the District Court and the Eleventh Circuit pertaining to the liability of the Chiefs and the Cities; therefore, the *Morales-Zamora* opinion has absolutely no relevance to the Chiefs and the Cities. *Morales-Zamora* does not involve the liability of an entity loaning drug-sniffing canines to the law enforcement agency actually conducting the roadblocks, and that issue was not even remotely addressed by the Tenth Circuit.

In the instant case, Petitioners rely only on an alleged "pretext...engaged in by an agency head" and assert the "pretext here was committed at the State's highest policy level." (Petition at 16.) Petitioners assert no such allegations against the Cities and the Chiefs.

Even though not relevant to the Cities and the Chiefs, the analysis of *Morales-Zamora* is distinguishable as it pertains to all Respondents. While the Fourth Amendment issues presented in *Morales-Zamora* may have been similar, the Eleventh Circuit did not find direct conflict with the Tenth

Circuit's opinion.[6] *Morales-Zamora* involved a motion to suppress allegedly tainted evidence discovered during a roadblock where drivers licenses, proof of insurance, and vehicle registrations were checked while a trained narcotics-detection dog walked around the exterior of the defendant's car.

In the case at bar, the District Court and the Eleventh Circuit found the record was simply inadequate to find liability on the part of any of the Respondents. There was no such finding in *Morales-Zamora*. In fact, the Tenth Circuit in *Morales-Zamora* had the benefit of two evidentiary hearings before the District Court.[7] Disappointed with the outcomes at the District Court and Eleventh Circuit, Petitioners cannot now make up for deficiencies in the record which prevented them from prevailing below.

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6 The Eleventh Circuit merely stated:

> The panel was aware that the Tenth Circuit reached a different result in a somewhat similar case: *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992). We were not persuaded by that opinion.

(Petitioners' App. at 10.)

7. When the defendant Zamora was charged with unlawful possession of marijuana, she filed a motion to suppress. The District Court granted the motion to suppress, holding absent a reasonable and articulate suspicion of drug-related criminal activity, a canine sniff occurring while the driver's documents are being checked violates the Fourth Amendment. The government took an interlocutory appeal of the District Court's ruling, and the Tenth Circuit reversed, holding such dog-sniffing activity was not a search under the Fourth Amendment, assuming the roadblock was not pretextual.

On remand, the District Court conducted a second hearing on Zamora's motion to suppress on the pretext issue. The District Court denied the motion. Zamora appealed the denial of that motion to the Tenth Circuit. *Morales-Zamora*, 974 F.2d at 150.

Petitioners attempt to obtain Supreme Court review of this decision based on their confusion of valid roadblock stops with the pretext analysis adopted in roving patrol stop cases.[8] Therefore, Petitioners' reliance on this Court's review of *United States v. Whren*, 53 F.3d 371 (D.C. Cir. 1995), *cert. granted,* Sup. Ct. No. 95-5841 (Jan. 5, 1996), is misplaced.[9] In their confusion, Petitioners turn the requisite analysis for pretext upside down. Following Supreme Court precedents finding roadblocks are different from roving patrols, the Eleventh Circuit declined to extend the analysis for finding pretext in roving patrol stops to roadblocks because roadblock stops involve no individual discretion of officers in the field. *Merrett,* 58 F.3d 1550 n.2.[10]

Lastly, any perceived conflict with the *Morales-Zamora* decision is moot. Given the affidavit of the Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, and the State Respondents' representation that the procedures it utilized more than twelve years ago have changed, the 1984 roadblocks are of academic interest only and not worthy of this Court's certiorari review. (State Respondents' App.)

---

8. Petitioners' confusion is shared by the dissenters to the denial of the Rehearing En Banc.

9. However, should this Court determine in its review of *Whren* that there is no pretextual stop where the roving patrol officer "could have" made the stop, there could not be a pretextual stop for a valid roadblock stop.

10. Petitioners erroneously cite *Myricks v. United States,* 370 F.2d 901 (5th Cir. 1967) as reported in the United States Reporter. It is a Fifth Circuit Case. More importantly, however, it is unclear from the context of that case whether it was a roadblock case. The Fifth Circuit stated the appellant was "stopped for a routine driver's license check." *Id.* at 902. The totality of the case suggests it may have been a roving patrol stop.

III. The Questions Presented Are Not Questions Worthy of Certiorari Review by this Court

As explained above, none of the questions presented have any relevance to the Chiefs or the Cities. Petitioners do not question the grounds on which the District Court found the Cities and the Chiefs not liable as a matter of law. Additionally, Petitioners misstate the Eleventh Circuit's analysis of their case, and assume facts not in the record to exaggerate their grievances in an attempt to obtain Supreme Court review.

The first question posed by Petitioners contains the flawed premise that the roadblock at issue was "established on the pretext of ensuring compliance with traffic related laws." (Petition at i.) The Eleventh Circuit found the state's interest in highway safety legitimate, and it was not necessary to consider the other reasons motivating the state to conduct the operation. *Merrett,* 58 F.3d at 1551. Further, the Eleventh Circuit described the operation as a "mixed motive roadblock," valid so long as one purpose presented for the roadblock could validly justify the roadblock, even if no roadblock would have been put into place but for the state's desire to hunt for unlawful drugs. *Merrett,* 58 F.3d at 1551.

Otherwise, the Petition attempts to reframe the perceived conflict with *Morales-Zamora* out of context, describing the operation as an "admitted and deliberate evasion of the law by law enforcement." (Petition at 20.) This statement has no basis in law or in fact, and is an example of Petitioners' overstatement and embellishment of the record.

The second question presented for review is likewise without merit. Petitioners once again rely on a flawed premise, assuming the roadblocks caused substantial delays and hardships to motorists that were unreasonable and therefore, unconstitutional. Petitioners also erroneously

state "the hardships caused motorists in this operation...went largely ignored in the court's analysis...." (Petition at 21.) In fact, the Eleventh Circuit analyzed this point at length:

> Next, we must consider whether this operation — as planned or in the reality of its performance — violated plaintiffs' constitutional rights; that is, whether these roadblocks were reasonable in light of the state's interest in conducting the roadblocks, the effectiveness of the operation in promoting that interest, and the level of intrusion on the individual's privacy caused by the checkpoints. *See Brown v. Texas*, 443 U.S. 47, 49-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979).

Merrett, 58 F.3d at 1551. Significantly the Eleventh Circuit relied on the facts as **presented in the record**:

> Pursuant to the operational plan, no motorist was to be detained at the checkpoint — that is the location where the motorist encountered the officers — for longer than the time required to conduct a driver's license and registration check.... **Nothing in the record indicates that, during execution of the plan, motorists were detained at the checkpoint for longer than this anticipated delay.**

Id. (emphasis added.)

> **Nothing in the record** indicates that many or most waiting drivers believed they could not leave the line.... Assuming the resulting delay to these drivers (the ones who left the line) was no more than a few minutes — **and we have no evidence to the contrary**, these motorists were not seized for an unreasonable period of time.

Id. at 1552 (emphasis added.)

> The record pertaining to whether people waiting in line believed they could turn around is not extensive.

Id. n.10.

Similarly, Petitioners incorrectly state the Eleventh Circuit did not adequately consider the disruption of Petitioners' travel plans in accordance with *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983). In fact, the Eleventh Circuit, relying on this Court's opinion in *Place,* found the search was not a search within the meaning of the Fourth Amendment. Further, based on the record, the appellate court found the use of the dogs did not increase the delay to the roadblock:

> So long as the use of the dogs did not make the delay caused by the roadblocks unreasonable — **and we have no evidence to the contrary, the state's decision to use dogs at the roadblocks does not make the operation unconstitutional.**

Id. at 1553 (emphasis added.)

Once again, Petitioners are bound by the record presented to the District Court and the Eleventh Circuit, and no amount of indignation or aggrandizement changes that they failed to prove their case below.

Petitioners' third question misstates the record by arguing motorists were seized in the line leading up to the roadblocks. Specifically Petitioners state:

> Motorists were seized by these roadblocks because a reasonable person would believe that he or she was not free to leave.

(Petition at 25.) This question is best answered by quoting the Eleventh Circuit's opinion. The panel found Petitioners simply did not produce the kind of record evidence necessary to avoid summary judgment on this issue:

> [P]laintiffs claim that the presence of a trooper in a "chase" car stationed behind the cars approaching the roadblock suggests that a reasonable person would not believe he could turn around. But, we think this circumstance is not probative.... This practice and experience suggest that people waiting at roadblocks believe they are free to turn around.
>
> Plaintiffs also claim that a reasonable person would not believe he was free to turn around for fear he could be prosecuted under Florida Statute section 316.1935.... **Nothing in the record indicates that the State of Florida has a practice of prosecuting drivers under this statute for turning around at roadblocks. And, plaintiffs present the affidavits of no drivers who wanted to turn around but say they did not do so for fear of prosecution under the s tatute.**
>
> Also, nothing in the record suggests that the physical terrain prevented motorists from turning around....
>
> **In the district court, plaintiffs stated that the record was sufficient to decide their claims on summary judgment. But, plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around.**

Id. at 1552 n.10 (emphasis added.)[11]

Lastly, Petitioners assert the canine sniffs did not establish probable cause in this instance because the dogs incorrectly signalled the presence of drugs in 27 of 28 instances. Such anecdotal evidence does not warrant Supreme Court review of a constitutional issue.

Petitioners' analysis is fundamentally flawed. Without challenging the adequacy of the dogs' training or the competency of the dogs' handlers, Petitioners simply look to the results of the search to determine whether the State Respondents had probable cause for the search. Such an argument must fail because it makes probable cause entirely dependent on an after-the-fact success ratio, not required by the Fourth Amendment.[12]

Petitioners again misstate the facts when they state Respondents have promised to repeat this operation. Their assertion flies in the face of the record, in particular the

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11. The Eleventh Circuit did find one motorist was seemingly seized for an unreasonable length of time while required to remain in line. *Merrett,* 58 F.3d at 1551. However, the Court found this supposed constitutional violation occurred in violation of the official plan, by individual officers not named in the action, who failed to let traffic pass through the roadblocks. Therefore, Respondents could not be held liable. *Id.* at 1553.

12. In *Marx v. Gumbinner,* 905 F.2d 1503 (11th Cir. 1990), a plaintiff brought a § 1983 claim based on false arrest. The Eleventh Circuit, citing *Draper v. United States,* 358 U.S. 307, 311 n. 4, 79 S.Ct. 329, 332 n. 4 (1959), stated:

> "the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Marx, 905 F.2d at 1507 [quoting Judge Learned Hand in *United States v. Heitner,* 149 F.2d 105, 106 (2d Cir. 1945)].

Affidavit of Robert L. Edwards, Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, wherein Mr. Edwards defined the changes that would be made in any future roadblocks, and thereby prevent the recurrence of the perceived injustices which may have occurred during these 1984 roadblocks. (State Respondents' App.)

CONCLUSION

A civil case wherein the plaintiffs failed to produce evidence to avoid a summary judgment is not the kind of case to which this Court should grant certiorari review.

Even if Petitioners presented adequate evidence below to avoid summary judgment, the questions they present are not ones worthy of this Court's consideration and this Court should not grant certiorari review.

In the alternative, should this Court accept this case for review, it should only grant the writ of certiorari as to the State Respondents. The Petition does not raise any questions relevant to the liability of the Chiefs and the Cities. The summary judgment entered in their favor should, therefore, stand.

Respectfully submitted,

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No. 95-1842

In The

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. MERRETT, and CECILIA A. CLAYTON, as personal representative of the estate of SOLOMON CLAYTON, JR., on their own behalf and on behalf of all others similarly situated, PETITIONERS

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement, ROBERT DEMPSEY, individually FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, ROBERT BUTTERWORTH, and LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITIES OF LAKELAND, MAITLAND, AND LARGO POLICE DEPARTMENTS, RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The Court's Recent Decision In *Whren V. United States* Strongly Supports Summary Reversal Of The Decision Below Or A Remand; Alternatively, Certiorari Should Be Granted To Consider The Critical Issue Not Directly Decided In *Whren*

On June 10, 1996, this Court decided *Whren v. United States*, ___ U.S. ___, 64 U.S.L.W. 4409 (1996), which strongly suggests that the decision below ought to be reversed summarily or remanded for reconsideration in light of *Whren*. Alternatively, to the extent that *Whren* did not directly decide the issues in this case, certiorari review is warranted to consider the important issues raised in this case.

Petitioners previously filed a supplemental petition on the potential impact of *Whren* on this case when we learned that *Whren* was pending before the Court. That supplemental petition set out the differences and similarities between *Whren* and this case. Our supplemental petition posited that one of the most important differences between the two cases was the fact that the stops in *Whren* were probable cause based; the stops in this case were made without any probable cause and, indeed, without any suspicion whatsoever. As it happened, this distinction was the focal point of the Court's decision in *Whren*, where the Court held that "pretext" is not an issue in probable cause based seizures, but remains a consideration in seizures not made on probable cause, such as the roadblocks in this case.

In *Whren*, this Court held that when a stop is based on probable cause, it matters not that the officer may have had some other motivation for the stop or may have engaged in "pretext". In such cases, no Fourth Amendment balancing is required because probable cause will almost always justify a seizure.[1] Absent the need to engage in balancing, the inquiry was easily solved:

> For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

64 U.S.L.W. at 4413.

The issue of "pretext" remains highly relevant, however, in stops not made on probable cause. Indeed, the *Whren* Court expressly distinguished roadblock cases – such as the one at bar – from probable cause stops, such as the one in *Whren*:

> It is of course true that in principle every Fourth Amendment case, since it turns on a reasonableness determination, involves a balancing of all relevant factors. With rare exceptions not relevant here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. That is why

---

[1] There are several exceptions to this rule noted by the Court in *Whren*, which were inapplicable to the facts there and which do not pertain to the instant case either.

> petitioners must rely upon cases like *Delaware v. Prouse*, 440 U.S. 648 (1979) to provide examples of actual balancing analysis. There, the police action in question was a random traffic stop for the purpose of checking a motorist's license and vehicle registration, a practice that – like the practices at issue in the inventory search and administrative inspection cases upon which the petitioners rely in making their "pretext" claim – involves police intrusion *without the probable cause that is its traditional justification*. Our opinion in *Prouse* expressly distinguished the case from a stop based on precisely what is at issue here: "probable cause" . . . What is true of *Prouse* is also true of other cases that engaged in detailed "balancing" to decide the constitutionality of automobile stops, such as [U.S. v.] Martinez-Feurte, 428 U.S. 543 (1976), which upheld checkpoint stops, and [U.S. v.] Brignioni-Ponce, 422 U.S. 873 (1975), which disallowed so-called "roving patrol" stops: ***the detailed "balancing" analysis was necessary because they involved seizures without probable cause***.

Id. at 4412 (first emphasis is original, second supplied). Thus, *Whren* expressly and plainly holds that the

validity of the seizures in the case at bar, like those in *Prouse*, *Martinez-Feurte*, and *Brignioni-Ponce* – and unlike those in *Whren* – does not rise and fall with the question of whether the government has a right to make the seizure; rather, that right must undergo the detailed Fourth Amendment "balancing" test, which includes the "pretext" analysis repeatedly referenced in numerous precedents of this Court, many of which were cited approvingly in *Whren*. *E.g.*, *Florida v. Wells*, 495 U.S. 1,4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *New York v. Burger*, 482 U.S. 691, 716-17 (1987); *Colorado v. Bannister*, 449 U.S. 1 (1980); *Texas v. Brown*, 460 U.S. 730 (1983)(a roadblock case); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

Thus, at the very least, *Whren* teaches that the seizures in the case at bar must undergo the balancing test *and* that the balancing test includes an examination of whether the seizure was "to be used as a ruse for a general rummaging in order to discover incriminating evidence," *Florida v. Wells*, *supra*, or as "a pretext for obtaining evidence of violation of penal laws." *New York v. Burger*, *supra*.[2] *Whren* also affirms the axiom that where a pretextual motive is behind an administrative seizure made without probable cause, the seizure fails the Fourth Amendment balancing test: "[W]e have never held, *outside the context of inventory*

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[2] In *Burger*, this Court wrote:

> There is, furthermore, no reason to believe that the instant inspection was actually a "pretext" for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made ***solely*** pursuant to the administrative scheme.

Id. at 717 n. 27 (emphasis supplied).

search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment. . ." *Whren* at 4411. This language seems to affirm the principles of *Wells*, *Bertine*, and *Burger* that pretext *will* invalidate a facially valid inventory or administrative inspection, such as a roadblock.[3]

Although the Eleventh Circuit panel below purported to apply a balancing test, it declined to consider the pretextual motives of Respondents, saying that "the pretext analysis, as set out in our precedents, does not fit the roadblock case." Pet. App. at 6 n. 20.[4] Indeed, the Eleventh Circuit's failure to include the "pretext" analysis in the weighing process was one of the chief complaints of the *en banc* dissenters, who have now been vindicated by *Whren*.

Thus, the opinion below is contrary to and inconsistent with *Whren*, creating irreconcilable conflict between the two decisions. Summary reversal based upon *Whren* is in order; alternatively, a remand for

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[3] Although *Whren's* language stating that "pretext" analysis must be employed in administrative cases – such as seizures made at driver's license roadblocks – is arguably only dicta, this language was quite central to the holding of Whren and does not seem to have been cavalierly used. The Court drew a fairly bright line in explaining that "pretext" analysis does not apply in probable cause based seizures, but continues to apply in administrative and inventory seizures.

[4] The panel below had the law precisely backwards: it held that "pretext" analysis applies in probable cause stops made by individual officers, but that it does not apply in non-probable cause stops made at driver's license roadblocks. Of course, *Whren* teaches that precisely the opposite is true.

reconsideration in light of *Whren* would also be appropriate. Should the Court believe that the question of the validity of pretextual roadblock seizures still exists in *Whren*'s aftermath, then certiorari ought to be granted to resolve this important issue.[5]

CONCLUSION

The decision below ought to be summarily reversed or remanded for further consideration based upon Whren; alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD S. STAFMAN
Counsel for Petitioners

JUNE 1996

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[5] In Respondent's Response to this Petition for Writ of Certiorari, they rely heavily upon their self-serving affidavit that their planned future roadblock stops designed to intercept drugs will be carried out slightly differently so as to lessen the inconvenience to those seized. However, this claim ought to make little difference in light of the pretextual nature of such stops, as condemned by *Whren* and the cases cited therein.

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No. 95-1842

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October Term, 1995

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Petitioners

v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS MOORE, DEMPSEY, DICKINSON AND BUTTERWORTH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

Not often do petitioners so heavily rely on authority they so completely misunderstand. This Court's decision in *Whren v. United States*, __U.S.__, 64 U.S.L.W. 4409 (1996), removes any possible need for certiorari review of this case.

Stripped to its essence, *Whren* held that police officers who observed a vehicle committing a traffic infraction had probable cause to make a stop. Since they possessed probable cause, the Fourth Amendment was satisfied and any pretext

for the stop was irrelevant. *Id.*, 64 U.S.L.W. at 4411 ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." [italics original]).

Petitioners' misunderstanding arises from their failure to realize that the term "probable cause" is itself a form of shorthand. "Probable cause," as used in *Whren*, means the existence of a legally sufficient, independent basis for a stop; so that any pretext is irrelevant.

Here, Petitioners concede there was a legally sufficient, independent basis for the roadblock—to check for drivers licenses, vehicle registration, and safety equipment.[1] Since there was an independent and proper basis for the roadblock, any other motives or pretext are as irrelevant here as they were in *Whren*. That the police were also motivated by a desire to enforce drug trafficking laws simultaneously is—by analogy to *Whren*—irrelevant.

Beguiled by their own logic, Petitioners simply refuse to recognize that *Whren*, like the other cases they advance, involved the unanticipated stop of an individual vehicle. Here, the roadblock was conducted according to a pre-implementation plan, which did not discriminate or involve officer discretion. Until rush hour traffic became overwhelming, all cars were stopped. The dog-sniffs were conducted simultaneously with the license and registration checks. Other than their objection to the use of sniff-dogs at all, Petitioners' claims all involve inadvertent delays that are not of constitutional significance.

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1 In their initial brief (pp. 21–22) to the 11th Circuit, Petitioners said:

> Although police roadblocks established to conduct license...checks are lawful when properly conducted
>
> * * *
>
> Although FHP certainly could have conducted these license checks absent the FDLE's invalid purpose.

Whren implies pretext may be a concern when the stopping officers do not have probable cause. However, *Whren* is factually limited to unanticipated stops of individual vehicles. It simply does not require an inquiry into pretext as to a roadblock in which vehicle and drug trafficking laws are enforced simultaneously.

CONCLUSION

Whren provides no basis for relief. The petition for certiorari should be denied.

Respectfully submitted,

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REASONS FOR GRANTING THE WRIT

I. The Court Has Recently Granted Certiorari In A Case Where The Decision May Substantially Impact On This Case And A Decision In This Case Could Impact That Case; Certiorari Should Be Granted To Consider The Matters Together

Just after Petitioners submitted this petition, Petitioners learned that the Court had recently granted certiorari in a case involving some closely related issues. *Whren v. United States*, 53 F.3d 371 (D.C.Cir. 1995), *cert. granted*, Sup. Ct. No. 95-5841(Jan 5,1996). The outcome of *Whren* could substantially impact on the outcome of the case at bar and the outcome of this case could substantially affect *Whren*.

The Court's grant of certiorari in *Whren* demonstrates the importance of the issues presented herein:

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the cause for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

Stern, Grossman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) at pp. 192-93. Indeed, the

issue presented herein is raised in a context that may make it more important than that in Whren because of the masses of undeniably innocent citizens affected by driver's license roadblocks. Certiorari should therefore be granted to consider the matters together. At the least, the Court may want to consider this case in light of the outcome of *Whren* and take appropriate action on it at that time.

Whren raises the question of whether law enforcement may, consistent with the Fourth Amendment, use pretextual reasons to make a stop, conduct a search, or effect a seizure. *Whren* involved an officer's stop of a vehicle for alleged traffic reasons, but the defendant claimed that the officer's true motivation was to investigate drug activity. The defendant argued that because the officers *would not* have made the stop absent the desire to investigate a drug violation, the stop was invalid. However, the circuit court held that the test for determining the validity of such a stop is not whether the officers *would have* made the stop but for an invalid reason, but whether the officers *could have* made the stop based on any asserted legitimate reason. Thus, the circuit court held that even if the officer's actual motivation for the stop was drug investigation without reasonable suspicion, so long as there had indeed been a traffic violation, the stop was lawful.

This Court granted review in *Whren* apparently to determine whether the proper analysis in pretext cases is the "*could have*" test, as several circuits utilize, or the "*would have*" test, as is utilized in other circuits. The instant case has some marked similarities and some important differences with

Whren, and depending on how the Court resolves this question and on how sweeping a decision it renders, the decision may impact substantially on the first question presented for review herein.

Should the Court adopt the "*would have*" test, as urged by the Petitioners in *Whren*, reversal of the decision below in this case would be required. After all, Respondents herein readily admit that they *would not* have stopped Petitioners but for their motivation to conduct dog sniffs. On the other hand, should the Court adopt the "*could have*" test, the decision may or may not require a particular result in this case, although the Court's reasoning is very likely to impact this case.

As was the case in *Whren,* Petitioners herein acknowledge that Respondents *could have* lawfully stopped them to conduct a driver's license check. However, there are several potentially important distinctions between this case and Whren: first, unlike the facts in *Whren*, there is no factual dispute in this case that Respondents *would not* have stopped Petitioners absent their unlawful motivation (Respondents have so conceded); second, the stops herein were roadblock stops and *not* based upon the reasonable suspicion standard; third, the pretextual decisions made in this case were made by agency heads, not officers in the field; and fourth, the scope of law enforcement action following the stops in each case was far different.

Because of the above distinctions, the circuit court's rationale in *Whren* does not apply to this case and this court's resolution of the issue may or may not apply to this case. More particularly, the circuit court in *Whren* reasoned that the "*could have*" test provides

"a more principled method of determining reasonableness" because it eliminates the need to evaluate the officer's subjective state of mind and it preserves the "reasonable suspicion" standard. 53 F.3d at 375-76. However, neither of these two reasons advanced to justify the *"could have"* test are applicable here.

The primary reason advanced by *Whren* for the *"could have"* test – to avoid the sometimes difficult inquiry into the officer's subjective state of mind -- is inapplicable here because *Respondents readily admit that their subjective motivation was to evade the law.* At least in a case where Respondents admit to their unlawful motive, the rationale of *Whren* makes little sense.

Second, the "*could have*" test cannot be justified here by strict enforcement of the reasonable suspicion standard -- as *Whren* suggests – because the stops in this case were *not* based upon reasonable suspicion. Indeed, if the "*could have*" test is adopted and it is allowed to be combined with unrelated doctrines that sometimes allow for searches and seizures without suspicion, such as driver's license roadblocks, there are then seemingly no controls to protect against the total abrogation of the Fourth Amendment by law enforcement.[1]

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[1] The facts of the case demonstrate that the approach followed by the circuit court in *Whren* is flawed. Most basically, the "*could have*" test applied by the D.C. Circuit is not a test for determining pretext but for excusing it. If the police lack even a facially plausible reason for stopping a vehicle, there is no need to claim pretext because reasonable suspicion is absent and the stop is therefore unconstitutional. The issue of pretext only arises when there is a facially plausible reason to conduct the

The third distinction between *Whren* and this case is the level of the decision-maker who sought to evade the law. Although the majority of the court below believed that an agency head should be free to engage in pretext, we have argued in our petition that pretextual actions by high ranking government officials are far worse than when committed by the officers in the field. *See* Petition at 16-17.

Finally, and perhaps most importantly, there is one other distinction between *Whren* and this case: the differences in the scope of the police action following the stop. In *Whren*, when the officers approached the car, they noticed drugs in the possession of an occupant. Thus, there was no additional action *initiated by the police* after the stop beyond what one would normally find in a traffic stop. Had the officers in *Whren* stopped the vehicle and immediately subjected it to a dog sniff, the outcome in *Whren* might have been quite different. This is so because of the well-settled principle that "an intrusion must be reasonably related in scope to the justification for commencing it." *Florida v. Royer*, 460 U.S. 491 (1983); *Warden v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

In two cases which have followed *Whren*, the courts have carefully circumscribed the "*could have*" test by requiring strict adherence to the principle that the police

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search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards. If the only question is whether some police officer "could have" stopped the defendant, every pretextual search will be sustained. In reality, therefore, the standard proposed by the circuit court in *Whren* can more fairly be described as a non-test.

action subsequent to the stop be justified by the circumstances of the stop. Thus, in *U.S. v. Botero-Ospina, 71 F.3d 783,788 (10th Cir. 1995)(en banc),* the Court explained:

> It goes without saying that, by adopting the standard we do today, we do not abandon the traveling public to "the arbitrary exercise of discretionary police power." Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the *Terry* analysis – whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by *Terry's* scope requirement.

(citations omitted). Similarly, in *U.S. v. Johnson,* 63 F.3d 242 (3rd Cir. 1995), the court applied to the "*could have*" test, but was quick to note the limitation imposed by the above principle:

> Furthermore, a traffic stop must be reasonably related in scope to the justification for the stop. *See Berkemer v. McCarthy,* 468 U.S. 420, 439 (1984) . . . . To justify a greater intrusion unrelated to the traffic stop, the totality of the circumstances known to the police officer must establish reasonable suspicion or probable cause to support the intrusion. Clearly, a lawful traffic stop is not "carte blanche" for an officer to engage in other unjustified action.

(citations omitted). Thus, it seems clear that had the officer in *Whren* made a pretextual traffic stop and then used a dog to sniff the vehicle and its occupants absent reasonable suspicion to do so, the dog sniff would represent an intrusion that cannot be justified by a minor traffic violation. Similarly, the dog sniffs in the instant case cannot be justified by the asserted need to check driver's licenses or vehicle safety. The fact that the post-stop conduct *initiated by the officer* in Whren did not go beyond what one would expect in a traffic stop distinguishes this case from that one.[2]

Thus, there are several important distinctions between this case and *Whren.* Nevertheless, the Court's decision in *Whren* could substantially impact on the decision herein. The adoption of the "*would have*" test would require reversal of this case. A sweeping decision which categorically adopts the

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[2] The defendant in Whren engaged in conduct after the stop that justified further police action. In this case, on the other hand, Petitioners engaged in no post-stop conduct to justify further police action.

"*could have*" test in all circumstances without regard to the factual distinctions between *Whren* and this case or the principle that "an intrusion must be reasonably related in scope to the justification for commencing it" would, on its face, arguably foreclose Petitioner's "pretext" argument raised in the first question presented. At the same time, the facts of this case demonstrate why a sweeping adoption of the "*could have*" test would not be sound. Because the two cases are so closely related and because of the importance of the questions presented, as this Court has acknowledged by the grant of certiorari in *Whren*, certiorari should be granted herein.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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[3] At the least, the Court should postpone consideration of this case pending the decision in Whren and dispose of it in accordance with that decision.